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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CHARLES B. CORCES, *Petitioner*

v.

UNITED STATES of America, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court of appeals is required to explain its affirmance of a six (6) level upward depature under the Sentencing Guidelines?

2. Whether a record custodian's personal Fifth Amendment rights are violated when he is compelled to appear and testify before the grand jury, via a subpena duces tecum and court order, and evidentiary use is made of said appearance and testimony, at his subsequent trial?

3. Whether it is a denial of due process and effective appellate advocacy for a court of appeals to deny a defendant access to transcripts of material *ex parte* communications between district judge and prosecutors for purposes of his appeal?

4. Whether the Eleventh Circuit's unpublished opinion rule, 11th Cir. R 36-1, contravenes a defendant's right of appeal, when he raises substantial issues and the court of appeals, pursuant to that rule, refuses to render a written opinion?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Questions Presented For Review i

Index To Appendix iii

Table of Authorities iv

Opinions Below 1

Statement of Basis for Jurisdiction 1

Constitutional provisions, statutes and regulations involved 2

Statement of the Case 2

A. The Six (6) Level Upward Departure Sentence 3
B. Evidentiary Use of Petitioner's Compelled Grand Jury Testimony 4
C. Denial of Access To Sealed Transcripts 5
(1) The *ex parte issue* 7
(2) The Judge Bonanno good faith issue 7
D. The Silent Decision 9

Basis For Jurisdiction In The Court of Appeals 10

Reasons For Granting Petition 10

Summary of Argument 10

Argument 11

Question One 11

Question One is Important To The Adminstration of The Sentencing Guidelines 13

Question One is Important To The Objectives of the Sentencing Reform Act In Seeking To Avoid Sentencing Disparities 16

Question Two 17

Importance of Grand Jury Subpoena Question 18

Question Three 20

Question Four 22

Conclusion 25

INDEX TO APPENDIX

Per Curiam Affirmance A-1-2
Order, Circuit Judge Susan M. Black A-3
Order, denying access to sealed transcripts A-4
Order compelling Grand Jury Production A-5-6
Oral Oral Judge Kovachevich A-7-8
Judgment and Sentence A-9-15
United States v. Valenti A-16-26
Order denying rehearing A-27
Fifth Amendment Excerpts A-28
Sixth Amendment Exceprts A-28
Title 18 U.S.C. § 3553 . . . . . A-29-32
Title 18 U.S.C. § 3742 . . . . . A-33-35
U.S.S.G 5K2.0 . . . . . A-36-37
U.S.S.G 5K2.7 . . . . . A-38
11th Cir. R. 36-1 . . . . . A-39
FRAP 34(a) A-40
Response and motion to quash subpoena A-41-52
Motion For Order Requiring Access To Transcripts A-53-54
Motion For Copy of Sealed Docket Sheet List A-55-56
First Superseding Indictment A-57-65

Record Excerpts Grand Juror Martin A-66-72
Record Excerpts Grand Juror Mostellar A-73-74
Record Excerpts Judge Bonanno
Good Faith Issue A-75-79

TABLE OF AUTHORITIES

CASES

Baxter v. Palmigiano,
425 U.S. 309 (1976) 10

Braswell v. United States,
487 U.S. 99 (1988) 5,17,18,19,20

Browder v. Director, Department of Corrections of Illinois,
434 U.S. 257 (1978) 24

Commisioner v. McCoy,
484 U.S. 3,7 (1987) 24

Coppedge v. United States,
369 U.S. 438 (1962) 21

Curcio v. United States,
354 U.S. 118 (1957) 20,22

Evitts v. Lucey,
469 U.S. 387 (1985) 21

Griffin v. Illinois,
351 U.S. 12 (1956) 21

Hardy v. United States,
375 U.S. 277 (1964) 21

Huddleston v. United States,
485 U.S. 681 (1988) 9

In re Grand Jury Subpoena,
784 F.2d 857 (8th Cir. 1986) 18

In re Grand Jury,
869 F. Supp. 298 (D.N.J. 1994) 20

In re Paradyne Corporation,
803 F.2d 604 (11th Cir. 1986 7

In re Special Fed. Grand Jury Empaneled,
819 F.2d 56, (3d Cir. 1987) 18

In re Taylor,
567 F.2d 1183 (2nd Cir. 1977) 23

Mayer v. City of Chicago,
404 U.S. 189 (1971) 21

Mistretta v. United States,
488 U.S. 361 (1989) 16

Raffel v. United States,
271 U.S. 494 (1926) 10

Smith v. United States,
502 U.S. 1017 (1991) 19,24

Sochor v. Florida,
504 U.S. 527 (1992) 13,18,23

Taylor v. United States,
493 U.S. 906 (1989) 24

United States v. Crutchfield,
26 F. 3d 1098 (11th Cir. 1994) 8

United States v. Dean,
989 F.2d 1205 (D.C. 1993) 18

United States v. Doe,
465 U.S. 605 (1984) 4,5,20

United States v. Doe,
959 F.2d 1158 (2d Cir. 1992) 18

United States v. Ellwest Theaters,
927 F. 2d 244 (6th Cir. 1991) 18,20

United States v. Gonzalez,
975 F.2d 1514 (11th Cir. 1992) 9

United States v. Rivera,
994 F.2d 942, (1st Cir. 1993) 14

United States v. Valenti,
987 F.2d 708 (11th Cir. 1993) 1,6

Webb v. Texas,
409 U.S. 95 (1972) 9

Williams v. United States,
503 U.S. 193 (1992) 12

Constitutional Provisions

Fifth Amendment, United States Constitution 2,4

Statutes

Title 18 U.S.C. § 3553 2,12,14,16
Title 18 U.S.C. § 3742 2,11,12,14,16,22
Title 28 U.S.C. § 991(b) 13

Title 28 U.S.C. § 995 (a)(15) 14
Title 28 U.S.C. § 1291 10,22

Rules

FRAP 4(b) 10,22
FRAP 34(a) 2,22
11th Cir. R. 35-1 2,23

Sentencing Guidelines

U.S.S.G. § 5k2.0 (policy statement) 2,3,15
U.S.S.G. § 5K2.7 (policy statement) 2,15

Other Authorities

Guidelines Manual (1994 Edition)
Ch 1,Pt A.2 The Statutory Mission 14
Ch 1 Pt A (b) Departures 14
Ch. 1 Pt A, 3, The Basic Approach 13

Miscellaneous

Wall Street Journal,
Wednesday December 14, 1995 24

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHARLES B. CORCES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Charles B. Corces respectfully petitions for a writ of Certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

I. OPINIONS BELOW

The decision of the court of appeals (A-1-2) is unpublished[1] as the court did not render a written opinion. A related opinion by the court of appeals in the same case is reported as United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) (A-16-26).

II. Statement of Basis for Jurisdiction.

Petitioner seeks to review a Judgement of the Court of Appeals, Eleventh Circuit, dated September 12, 1995, affirming, per curiam, without opinion, a judgment and sentence in a criminal case.

On, September 26, 1995, a timely Suggestion Of Rehearing

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[1]The Court has stated that the fact that a decision of a court of appeals is unpublished carries no weight in its decision to review a case, regardless of any assumed lack of precedential effect . Commissioner v. McCoy, 484 U.S. 3, 7 (1987).

En Banc was filed by Petitioner. Pursuant to 11th Cir.R.35-6, such a suggestion is treated as a petition for rehearing before the original panel.

The Suggestion of Rehearing En Banc and Petition For Rehearing were denied on November 17, 1995, again without any written opinion. (A-27). This Petition is filed within 90 days of the denial of the Petition For Rehearing.

Jurisdiction in the Court is conferred pursuant to Title 28 U.S.C. § 1254(1).

III. Constitutional provisions, statutes and regulations involved.

Fifth Amendment, Constitution of United States. (A-28).
Title 18 U.S.C. § 3553 (A-29-32).
Title 18 U.S.C. § 3742 . (A-33-35)
U.S.S.G § 5K2.0 (policy statement) (A-36-37).
U.S.S.G § 5K2.7 (policy statement) (A-38).
11th Cir R. 36-1 (A-39).
Federal Rule Of Appellate Procedure 34(a) (A-41).

IV. Statement of the Case.

Petitioner was convicted of one count of conspiracy to commit extortion under color of official right, (count three), of a four count indictment. (A-57-65). The jury deadlocked on the other counts and they were subsequently nolle prossed.

Count three alleged, essentially, that Petitioner, a private attorney and Valenti, an assistant state attorney, conspired to solicit a bribe from one Manuel Machin, a private attorney, in return for a favorable sentence in a murder case brought by the state of Florida against one Nelson Gonzalez. Machin was representing Gonzalez in the murder case.

Valenti, entered into a plea agreement with the government and, via a separate information, pleaded guilty to one count, viz: conspiracy to commit extortion under color of official right, the exact offense of which Petitioner was subsequently convicted. After receiving absolute immunity on all the other charges he testified for the government at Petitioner's trial.

Petitioner was sentenced to ten (10) years imprisonment after the court imposed a 6 level upward departure. (A-9-15). A month later Valenti was sentenced to five (5) years probation for the exact identical offense and conduct. (R151-121).

A. The Six (6) Level Upward Departure Sentence. (Facts material to Question One).

Petitioner's presentence report (PSR) recommended an adjusted guideline range of 22 with a Criminal History of I for an imprisonment range of 41 to 51 months. The PSR had recommended against any upward adjustment for role in the offense finding that Petitioner had a minor role in the offense in that Petitioner came into the picture only after the assistant state attorney (Valenti) and the alleged victim of the extortion, (Machin) had initiated the matter and approached Petitioner.

The court, however, rejected the PSR's recommendation and imposed a 4 level increase for role in the offense, resulting in an imprisonment range of 51 to 63 months. (A-14).

Additionally, the court departed upwards by six (6) levels, over Petitioner's objections, (R7-306-13). The court gave the following reasons:

> 5K2.0 - 6 levels added due to impact on the judicial system by defendant's gross abuse of the legal judicial system of the 13th Judicial Circuit, State of Florida. (A-15, R8-541, p. 5).

However, while the sentencing court gave reasons for its

upward departure it made no specific factual findings supporting those reasons.

On appeal Petitioner raised, as an issue, the 4 level increase for role in offense plus the propriety and reasonableness of the six (6) level departure, but the court of appeals, in affirming, declined to render a written opinion.

B. Evidentiary Use of Petitioner's Compelled Grand Jury Testimony. (Facts material to Question Two).

After Petitioner already stood indicted, a subpoena duces tecum was issued to the custodian of records of Petitioner's law practice directing the custodian to appear and testify before the grand jury and produce certain records.

Petitioner, as records custodian of his sole law practice, (although incorporated), appeared before the grand jury and asserted his Fifth Amendment rights against self incrimination. The government filed a motion to compel. (R92-2-4, Ex. 11-H). Petitioner responded, and moved to quash the subpoena, arguing that before being compelled, as records custodian, to produce the documents, and to testify, he should be granted use immunity as per United States v. Doe, 465 U.S. 605 (1984). (A-41-52, R92-2-4, Ex. 11-H).

The district judge, after determining that Petitioner was the actual custodian of the records, granted the government's motion to compel without requiring the government to grant Petitioner use immunity. (A-5-6, R92-2-4, Ex.11-H). Petitioner then complied by appearing before the grand jury, as compelled, produced the records and testified pursuant to the subpoena and court order. (R85-42)

At trial, over Petitioner's objections, the district court allowed the government to make evidentiary use of Petitioner's grand jury appearance, production of records and testimony through the testimony of two grand jurors. The district judge's specific

oral ruling appears at A-7-8. Additionally, the court instructed the prosecutor that he could not only present evidence of the act of production, but that he could present evidence concerning the actual questions asked in the jury room concerning the location of the records. (A-7-8). Again Petitioner objected on Fifth Amendment grounds. (A-8).

The two grand jurors then testified that Petitioner had been compelled to appear before the grand jury by the subpoena and the court order, (A-66-67, 71, 74). They were allowed to testify as to the exact questions asked of Petitioner in the grand jury, (A-69), including production and authentication of the records, the fact that Petitioner was questioned about records pertaining to the Nelson Gonzalez case, (A-71), destroyed records (A-71-72) and questions pertaining to other cases, not the subject of the trial. (A-69-70). Throughout, Petitioner continued to object and moved for a mistrial, (A-68, 72).

In his appeal, Petitioner raised the issue of his being compelled to appear and testify before the grand jury without the grant of use immunity, citing United States v. Doe, 465 U.S. 605 (1984), and the issue of the evidentiary use of his appearance and testimony at the grand jury, citing Braswell v. United States, 487 U.S. 99 (1988), but the Court of Appeals declined to render a written opinion in its affirmance.

C. Denial Of Access To Sealed Transcripts. (Facts material to Question 3).

Throughout the entire criminal proceedings, before trial, during trial and even after trial, prosecutors engaged in *ex parte* communications with the court. Petitioner has been unable to ascertain the number, since he has been denied access to them. (except to the extent that there are docket

entries indicating their occurrence[2]). He estimates that there were some 30 *ex parte* pleadings and/or sealed documents filed by the prosecutors. These were filed in Volume nine (9) of the record on appeal and designated in the docket with an "S" entry. (R9-S1-4, R9-S5, R9-S6-7, R9-S9, R9-S10-13, R9-S14-15, R9-S16-17, R9-S18, R9-S19, R9-S20-22, R9-S23-25, R9-S28, R9-S56-59, R9-S64, R9-S65, R9-S66, R9-S67, R9-S68, R9-S70, R9-S71, R9-S72, R9-S73, R9-S74, R9-S77, R9-S78, R9-S79, R9-S80, R9-S81, R9-S82, R9-S83, R9-S84-85, R9-S87). These appear to have resulted in some nine (9) *ex parte* meetings between the court and prosecutors. (R9-S-8, R-S-26, R-S-29, R9-S-35, R9-S-38, R9-S-60, R9-S-69, R9-S-75, R9-S-76).

Additionally, the court reporter transcribed some 20 *ex parte* proceedings conducted during the course of the trial and submitted to the court of appeals, but to which Petitioner has been denied access. (R58, R69, R83, R88, R89, R91, R94, R95, R97, R98, R100, R101, R114, R116, R117, R119, R120, R125, R127, R129).

Throughout, Petitioner objected to these *ex parte* communications between court and prosecutors and requested transcripts. (R1-47, R4-295, R6-431, R123-20, A-79). To no avail. (R123-22, A-79).

After Petitioner filed his notice of appeal, he filed another motion in the district court, asking that he be provided access to the sealed lists for appellate purposes. The motion was denied by the district court, via a stamp on the motion. (A-55-

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[2]These docket entries were not even recorded in the public docket and thus Petitioner was not aware of them until in United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) (A-16-26) the district court was prohibited from continuing its sealed docket practice, See Valenti, (A-25-26), and the clerk only thereafter began recording the *ex parte* communications in the public docket.

56, R8-528).

Petitioner then filed a motion in the Court of Appeals for access to the sealed transcripts in order that he might properly prosecute his appeal. (A-53-54). By order of Circuit Judge Black, the ". . . motion for access to sealed transcripts [was] carried with the case." Judge Black, however, also ordered the government to compile the transcripts of all *ex parte* conferences and to list and itemize them by date and subject matter for the court without requiring a copy of the list to be provided Petitioner.(A-3). Thus, Petitioner was never provided with either a list or subject matter of these communications.

In his appeal, Petitioner raised at least two issues which involved the need for access to the sealed transcripts: the *ex parte* issue and the Judge Bonanno good faith issue.

(1) The *ex parte* issue.

In the *ex parte* issue, Petitioner complained about the repeated *ex parte* communications without a showing of necessity and in denying him access to transcripts of those communications. Petitioner relied on the Eleventh Circuit's own decision in In re Paradyne Corporation, 803 F.2d 604, 612 (11th Cir. 1986), where the Court of Appeals had held that they should occur rarely, that they are frowned upon by Canon 3(A)(4) of the Code of Judicial Conduct, and, even where they are conducted because of some necessity, that the defendant should be provided a transcript so that he might meet any of the one-side representations that may have been made by prosecutors.

(2) The Judge Bonanno good faith Issue.

The other issue concerned a crucial trial ruling. As collateral crime evidence, the government' key witness, (Machin), had been allowed to testify that Petitioner's secretary had provided sexual favors to Florida Circuit Judge Bonanno in exchange for

favorable rulings. All three, Petitioner, his secretary and the judge, under oath, at trial, denied the allegations. On cross-examination, the prosecutor did not question any of them concerning their denials, (A-78), but, in cross-examining the judge, prosecutors proceeded to ask him collateral questions about his use of escort prostitution services and threats to one of the women if she disclosed the fact, all, of which, the judge denied. (A-76-77).

Petitioner objected, arguing the government did not have a good faith basis for such questions. (A-75, 76, 77, 78). But, in overruling the objection, the court allowed the government to present its alleged good faith *ex parte* to the court, (A-78-79), and denied Petitioner access to transcripts of the alleged *ex parte* good faith representation. (A-79).

Petitioner raised the lack of good faith for such questions on appeal. In support of his position, Petitioner cited the Court of Appeals its own decision in United States v. Crutchfield, 26 F. 3d 1098 (11th Cir. 1994), where in a similar scenario it held that ". . . the prosecutor apparently lacked even a good faith basis for these allegations and was simply attempting to discredit [a defense witness's] testimony with the jury." Petitioner complained, moreover, that he was hindered in presenting his argument because of his being denied access to the transcripts. In its answer brief, the government stated:

> The government welcomes this Court's evaluation of both the preliminary proffer and the sealed transcript of the subsequent, ex parte proffer, R125, in deciding the good faith issue. (Govt's br. p. 54-55).

Nevertheless, on the same day that the court of appeals affirmed Petitioner's judgment and sentence, without writing an opinion, it entered an order stating:

> "Appellant's motion for access to sealed transcripts is DENIED." (A-4).

D. The Silent Decision. (Facts material to Question Four).

In addition to the issues concerning sentencing, the *ex parte* communications, evidentiary use of compelled grand jury testimony, and the Judge Bonanno good faith issue discussed above, Petitioner raised numerous other issues all of which had legal and factual support. A few examples, (paraphrased):

(1) That in violation of Webb v. Texas, 409 U.S. 95 (1972), and its progeny, prosecutors drove a willing defense witness from the witness stand by threatening to prosecute him if he dared testify for the defense.

The basic facts supporting this issue were that Nelson Gonzalez, one of the named victims in the indictment, had written an unsolicited letter to the court indicating a willingness to testify, inter alia, about efforts by the government's key witness to get him to lie against Petitioner, but that when Petitioner sought to have Nelson Gonzalez testify as a defense witness, the prosecutor threatened to prosecute Nelson Gonzalez for perjury, RICO, etc., if he dared testify. Nelson Gonzalez, subsequently exercised his Fifth Amendment rights and refused to testify.

(2) That in violation of Huddleston v. United States, 485 U.S. 681 (1988), and the Eleventh Circuit's own decision in United States v. Gonzalez, 975 F.2d 1514 (11th Cir. 1992) the trial judge erred in refusing to give a requested limiting instruction with respect to the relevancy of extrinsic crime evidence. (e.g. the Judge Bonanno sexual favors allegation discussed above).

(3) That the trial court erred in refusing to allow Petitioner to cross-examine the government's key witness, and named indictment victim, Machin, concerning the fact that when called as a defense witness at Petitioner's first trial, (which had ended in deadlocked jury), Machin took the Fifth Amendment and refused to testify. In precluding this cross-examination, the trial judge ruled that it would violate witness Machin's Fifth

Amendment rights. . As authority that such ruling was in error, Petitioner cited Baxter v. Palmigiano, 425 U.S. 309 (1976) and Raffel v. United States, 271 U.S. 494 (1926) to the court of appeals.

But, no written opinion was forthcoming on any of the issues.

V. Basis For Jurisdiction In the Court of Appeals

Petitioner invoked the jurisdiction of the Court of Appeals under Title 28 U.S.C. § 1291, Rule 4 (b) of the Federal Rules of Appellate Procedure and Title 18 U.S.C. § 3742 appealing his judgment of conviction and for a review of the sentence in that the sentence was imposed in violation of sections (a) (1) (2) and (3) of § 3742.

VI. Reasons For Granting Petition.

Summary of Argument

Petitioner raises four separate questions, but they have one common denominator: the fact that the lower court refused to write an opinion. It is to easy to conclude that this affects only one criminal defendant - and who cares. But, by virtue of its very silence, the decision of the court of appeals raises important questions as to whether there are certain situations in the administration of criminal justice and the Sentencing Reform Act where a court of appeals is required to render an opinion explaining its decision.

This case also calls upon the Court to consider the recurring question concerning the interplay between a subpoena duces tecum issued to a records custodian and the Fifth Amendment right against self incrimination; a question, which, considering the importance of a subpoena as an investigative tool, is in need of further refinement. The factual scenario of the instant case calls upon the Court to decide an

issue that has never squarely been before the Court, that is, whether evidentiary use may be made of a custodian's compelled appearance and testimony before the grand jury pursuant to a subpoena duces tecum.

Additionally, this case raises the compelling question as to whether a court of appeals departs from the accepted and usual course of judicial proceedings when it denies an appellant in a criminal case access to sealed transcripts of the private meetings between judge and prosecutors; transcripts which are material to adequately present his issues and thus to adequate appellate advocacy.

Argument

1. Whether a court of appeals is required to explain its affirmance of a six (6) level upward departure under the Sentencing Guidelines?

The court of appeals affirmed a six (6) level upward departure without explaining, in any way, why the factor considered as justifying departure was valid or why the extent of the departure was reasonable. This calls into question whether the goals of the Sentencing Reform Act are or can be met by selective appellate review of departure sentences. It calls upon the Court to further define the duties of a court of appeals in reviewing a departure sentence, a question which has not been, but should be, directly decided by the Court.

It is beyond peradventure that Title 18 U.S.C. § 3742 imposes certain duties on a court of appeals in reviewing a departure sentence. Subsection (e) requires a court of appeals to determine whether a sentence "(3) is outside of the applicable guideline range and is unreasonable. . . " and subsection (f) provides that "[i]f the court of appeals determines that the sentence

(2) is outside the applicable guideline range and is

> unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions. . ."

Concededly, § (f)(2) does not affirmatively require a court of appeals to ". . . state specific reasons. . . " why it may find that a departure factor does not fall outside the applicable guideline range nor to state specific reasons why the extent of the departure is unreasonable.

But, the essence, if not the holding of the Court, in Williams v. United States, 503 U.S. 193 (1992), in interpreting Title 18 U.S.C. § 3742, appears to so require. If so, then by the very fact that the court of appeals did not write any opinion at all renders its decision, at least in principle, in conflict with Williams and contravenes the intent of Title 18 U.S.C. § 3742. Regardless, it is a question that should be directly answered by the Court.

There are at least three reasons why Petitioner believes that a court of appeals is required to explain its reasons for approving the basis for and extent of an upward departure.

First, if a guideline sentence is the presumed correct sentence, Title 18 U.S.C. § 3553(b), then, it would seem that an affirmance of a departure sentence requires some explanation.

Second, in explaining §§ 3742(f)(1) and (f)(2) the Court, in Williams stated that

> [i]n order to give full effect to both provisions. . . the reviewing court is obliged to conduct two separate inquiries. (emphasis supplied). 503 U.S. at 203.

Paraphrased, these two inquiries concern (1) the validity of

the factor supporting departure and (2) the reasonableness of the extent of the departure.

With deference, we are unable to fathom how a court of appeals can conduct such inquiries via a silent decision unless one contemplates that they be conducted within the inner recesses of the minds of the individual judges. Moreover, the reasoning of the Court in Sochor v. Florida, 504 U.S. 527, 540 (1992), where it held that a harmless error analysis must be explained and is not satisfied simply because the court considers the case, would seem to apply with equal force to guideline departure situations.

Third, any other interpretation would create an anomaly. A court of appeals would be required to explain its reasons when it finds an upward departure invalid or when it finds the extent of the departure unreasonable. Under the dictates of Sochor, supra, it will also be required to explain its reasons when it finds the factor justifying departure invalid, but harmless. On the other hand, if the court of appeals agrees with the sentencing court as to the validity of the factor and the extent of the departure, it need not provide any reasons why it agrees. It may simply express its agreement by its silence.

Such an anomaly not only reeks with a sense of unfairness, but will invariably result in the very disparities which the Sentencing Reform Act itself was designed to avoid.

Question One Is Important To The Administration of the Sentencing Guidelines.

Silent decisions in departure cases deprives the Court, other reviewing courts and the Sentencing Guidelines Commission the benefit of precedence and contravenes one of the sentencing objectives of the guidelines, viz: ". . . reasonable uniformity in sentencing. . . ." See *Guidelines Manual*, (1994 Edition) Ch.1 Pt.A, 3. The Basic Approach, and Title 28 U.S.C. § 991 (B).

They hinder the Commission in meeting its statutory mission of ". . . monitor[ing] sentencing practices in the federal courts." *Guidelines Manual,* (1994 Edition) Ch 1, Pt A. 2 The Statutory Mission.

As explained by the Guidelines Commission:

> By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted. *Guidelines Manual,* (1994 Edition) *Ch 1 Pt A (b)* Departures. (emphasis supplied).

They also hinder the Commission in the performance of its powers to

> collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of Title 18 United States Code.
> See Title 28 § 995 (a)(15).

Justice Breyer, then Chief Judge, recognized the importance of a written decision in United States v. Rivera 994 F.2d 942, 950, (1st Cir. 1993) when he wrote:

> Second, the court of appeals must (as it ordinarily does) give "specific reasons" for its decision. 18 U.S.C. @ 3742(f)(2). These two instructions, taken together, help assure that the courts of appeals, with their more distant, yet broader, perspective, will also play an important indirect (as well as the obvious direct) role in the further development of Guidelines. They play this "indirect role" as the Commission examines the courts of appeals' decisions and reacts, through revision, or reiteration, of the Guidelines.

This case provides an excellent example as to why written decisions in departure cases are important to Guideline administration. The sentencing judge gave the following reason for the upward departure:

> "5K2.0 - 6 levels added due to impact on the judicial system by defendant's gross abuse of the legal judicial system of the 13th Judicial Circuit, State of Florida." (R8-541, p. 5, A-15).

But, at least two policy statements in the guidelines appear to reject "impact" as an appropriate factor. The policy statement of 5K2.0 specifically rejects "disruption" of a governmental function as a factor justifying upward departure in bribery cases, inasmuch as "disruption" is already taken into consideration in arriving at the appropriate sentence: (See A-36-37).

Similarly, §5k2.7 (policy statement) specifically rejects "interference" with a governmental function as a factor which justifies upward departure in bribery cases because it is inherent in the offense. It reads, in part:

> Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference. (A-38).

While there may be some valid reason why "impact," on the judicial system is a valid factor justifying departure in a bribery case, whereas "interference" or "obstruction" is not, the Court of Appeals has, by its failure to explain, hindered the Commission in its mission to continually refine the guidelines and failed to provide the precedence that the proper administration of the guidelines requires.

Question One Is Important To The Objectives of the Sentencing Reform Act In Seeking To Avoid Sentencing Disparities.

The silent decision of the court of appeals contravenes the intent of Title 18 U.S.C. § 3553 (a)(6), which instructs sentencing courts to avoid unwarranted sentencing disparities and the duty imposed on a court of appeals under Title 18 U.S.C. § 3742 (e)(3) to determine whether a sentencing disparity is unreasonable.

Silence concerning the disparity between the sentence of the assistant state attorney to 5 years probation -- the one of the two which would have the most "impact" on the judicial system -- and Petitioner's sentence of 10 years incarceration raises serious questions as to whether the objectives the Sentencing Guidelines Statute are, in fact, being met. The judge appeared to recognize that, if either of the two had an "impact" on the system, it was the assistant state attorney when in sentencing him, she stated:

> "Without you, Mr. Valenti, other people could not have had access to that public trust. You were the key that opened up the door." (R151-19).

This case serves as a classic example as to how, when a court of appeals abrogates its role as set out in Title 28 U.S.C. § 3742, the purposes of the Sentencing Reform Act will be frustrated and how abuses can occur or, at the very least, perceived to have occurred. This unexplained disparity in the sentencing court's failure to impose the "impact" factor on both or neither, is the very abuse that the Sentencing Reform Act sought to avert. See Mistretta v. United States, 488 U.S. 361 (1989). If reviewing courts are allowed to approve departure sentences, with no more than a nodding approval, then the legislative intent has been frustrated.

2. Whether a record custodian's personal Fifth Amendment rights are violated when he is compelled to appear and testify before the grand jury, via a subpena duces tecum and court order, and evidentiary use is made of said appearance and testimony, at his subsequent trial?

In Petitioner's case, the government did exactly what the government in Braswell v United States, 487 U.S. 99 (1988) conceded it could not do. It made evidentiary use of Petitioner's compelled appearance and testimony before the grand jury pursuant to the subpoena duces tecum - testimony which was highly incriminating and prejudicial. The government made evidentiary use of the fact that Petitioner appeared before the grand jury pursuant to the subpoena and court order compelling compliance with the subpoena. It made evidentiary use of the fact that he produced the documents. It made evidentiary use of the fact that he authenticated the documents and it made evidentiary use of the fact that he was questioned concerning destroyed records and other cases not the subject of the trial.

In Braswell, the Court held that a corporate custodian may not resist a subpoena for corporate records on the grounds that the act of production would be personally incriminating.

The Court emphasized, however, that there was a distinction between production of the records before the grand jury and evidentiary use of the act of production, acknowledging that, if the custodian, at some later time was prosecuted, the government could make no evidentiary use of that production at his trial. The Court stated:

> Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the individual. For example, in a criminal prosecution against the custodian, *the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's*

documents were delivered by one particular individual. (italics supplied) Id 487 U.S. at 118.

In addition to Braswell, at least five circuits, citing Braswell, have acknowledge that the government may not make evidentiary use of a custodian's appearance and act of production pursuant to a subpoena duces tecum: United States v. Dean, 989 F.2d 1205 (D.C. 1993); United States v. Doe, 959 F.2d 1158, 1164 (2d Cir. 1992); In re Special Fed. Grand Jury Empaneled, 819 F.2d 56, 59 (3d Cir. 1987); United States v. Ellwest Theaters, 927 F. 2d 244, 251 (6th Cir. 1991); In re Grand Jury Subpoena, 784 F.2d 857, 861 (8th Cir. 1986).

We anticipate that the government may argue that the Court of Appeals may have affirmed because it found the error to be harmless. But, this is not a plausible explanation since the Court has specifically held that an appellate court is required to explain a harmless error analysis, Sochor v. Florida, 504 U.S. 527, 540 (1992), which would require a written opinion. Moreover, Petitioner called Sochor to the lower court's attention in his petition for rehearing. Nevertheless, no written opinion.

Importance of Grand Jury Subpoena Question

The interplay between a subpoena duces tecum and the Fifth Amendment's right against self incrimination is a recurring question which the Court, in varying scenarios, has been called upon to answer.

It is palpably clear that what was allowed in Petitioner's case was in direct contravention of the Court's proscription in Braswell. However, Braswell's pronouncement, could well have been considered by the Court of Appeals as *obiter dicta* since it was not necessary to the ultimate Braswell holding. The Braswell facts did not go beyond the resisting stage of a subpoena to the point where evidence of production was actually offered and/or introduced at trial. The same holds true with the other cases above cited.

This case presents the opportunity to clearly elevate this *obiter dicta* to a direct holding by the Court because it is the first case that has reached the stage where evidentiary use is actually made of a custodian's, production, identification and authentication of records before the grand jury.

In view of what occurred to Petitioner, unless the Court elevates Braswell's *dicta* to a holding, thus assuring that its proscription against evidentiary use of the act of production must be followed and not ignored as being only *obiter dicta,* any attorney faced with a client so subpoenaed would have to advise his client to ignore Braswell, risk contempt and resist such a subpoena to the hilt, lest his client suffer a Fifth Amendment violation and it be used against him. By clarifying that its pronouncements will be enforced, the Court will provide the necessary assurance to those subpoenaed that evidentiary use of that compliance will not be allowed, thus avoiding, in many cases, protracted litigation at the resisting stage of a subpoena.

The case raises the compelling question as to whether the pronouncements of the Supreme Court of the United States - *obiter dicta* or not - may be frustrated through the vehicle of a nonpublished - and in fact sub silentio - decision.

> Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have lingering effect in the circuit and surely is as important to the parties concerned as a published opinion.

Smith v. United States, 502 U.S. 1017, footnote, (1991), Justice Blackman dissenting in denial of certiorari with whom Justice O'Conner and Justice Souter concurred.

This case is an affirmation of the above quote and why the Braswell proscription needs be elevated to a holding. The district judge either did not understand Braswell or chose to ignore its proscription against evidentiary use as being *obiter*

dicta. First she concluded that a substitute custodian could have been appointed, (A-7), but Braswell specifically rejected this as a viable alternative. Id 487 U.S. at 116-117. Even if not, that has nothing to do with evidentiary use. Second, she concluded that Braswell allows evidentiary use concerning the existence and location of records, (A-7-8), which it does not. The nonpublished affirmance leaves the district judge with the conclusion that she was correct. Additionally it provides fodder for prosecutors to convince other judges that it is allowed.

Moreover, this case presents the Court with the opportunity to clarify whether Braswell permits requiring testimony in order to authenticate the records, as occurred in this case. In Curcio v. United States, 354 U.S. 118 (1957), the Court held that a corporate custodian's personal right against self incrimination protected him from having to provide oral testimony as to the location of the subpoenaed records. However, relying on Braswell, at least one other circuit has held that Curcio does not preclude oral testimony to authenticate the records. United States v. Ellwest Theaters, 927 F.2d 244 (6th Cir. 1991). But, contra see In re Grand Jury, 869 F. Supp. 298 (D.N.J. 1994).

Finally, it calls into question whether United States v. Doe, 465 U.S. 605 (1984) continues to be viable in requiring use immunity, or, whether Braswell's constructive use immunity is sufficient not only in situations where the subpoena does not require testimony, (Braswell), but in those where testimony is required. (Doe).

3. Whether it is a denial of due process and effective appellate advocacy for a court of appeals to deny a defendant access to transcripts of material *ex parte* communications between district judge and prosecutors for purposes of his appeal?

As we set out in section C of the statement of the case, the district court engaged in repeated *ex parte* communications

with prosecutors. It is manifest that transcripts of those communications were material to at least two issues on appeal. It is manifest that at least one of these communications was influential in a crucial trial ruling, i.e. the Judge Bonanno good faith issue. Since Petitioner has been denied access to the transcripts of these communications, it is impossible for him to even guess what other crucial rulings were involved. There should be little dispute that these *ex parte* communications were crucial; otherwise, why have them?

For some time now, the Court has made it abundantly clear that a transcript of a trial - or at least its adequate equivalent - is a prerequisite to a decision on the merits on appeal.. Griffin v. Illinois, 351 U.S. 12 (1956). Anything short of a complete transcript is incompatible with effective appellate advocacy. Hardy v. United States, 375 U.S. 277, 288, (1964) (Goldberg, J. concurring). All who pursue articulable claims on appeal are assured access to a transcript in aid of their preparation. Mayer v. City of Chicago, 404 U.S. 189, 190-191 footnote 1. (1971). A record of sufficient completeness to permit proper consideration of the claims must be afforded an appellant. Coppedge v. United States, 369 U.S. 438, 446 (1962). Where adequate appellate review is denied by virtue of a denial of transcripts, the due process clause is implicated. Evitts v. Lucey, 469 U.S. 387 (1985).

The above cases establish that the accepted and usual course of judicial proceedings in a court of appeals is to allow an appellant access to transcripts of trial proceedings in order to assure effective appellate adequacy. Petitioner was clearly denied such access. This calls, it is respectfully submitted, for the exercise of the Court's supervisory powers.

Without access to the sealed records it was impossible for Petitioner to adequately argue he was prejudiced by these *ex parte* communications. Without access to the sealed records it was impossible to adequately argue and/or explain why prosecutors did not have a good faith basis for cross-

examining Judge Bonanno as they did - or, for that matter, why Judge Bonanno, himself, was entitled to know where the prosecutors were coming from with their questions in order to adequately answer the questions propounded. Additionally, without access to the records Petitioner was unable to intelligently evaluate which issues to raise or not to raise on appeal.

Consequently, this case raises a very important question as to when and under what circumstances, if any, a criminal defendant may be denied access to transcripts of secret communications between judge and prosecutors for purposes, of perfecting his appeal. Is, for instance, a "continuing investigation" such a compelling higher interest that it justifies denying an appellant the fullness of his appeal?

4. Whether the Eleventh Circuit's unpublished opinion rule, 11th Cir. R 36-1, contravenes a defendant's right of appeal, when he raises substantial issues and the court of appeals, pursuant to that rule, refuses to render a written opinion?

As we believe we have demonstrated, Petitioner raised numerous substantial issues which had legal and factual support. Yet, the court of appeals declined to write an opinion[3].

This raises an important question as to when a court of appeals may refuse to render a written opinion; after all, appeals from judgments of conviction and from departure sentences are matters of right. Coppedge v. United States, 369 U.S. 438, 441 (1962), Title 28 U.S.C. § 1291, FRAP 4.(b), Title 18 U.S.C. § 3742. If a silent decision suffices to satisfy

---

[3] The fact that oral argument was granted by the court of appeals militates against any contention that Petitioner's issues were frivolous inasmuch as FRAP 34(a), (A-40), allows a court to dispense with oral argument where issues are frivolous.

those rights in cases when the issues are not frivolous, but in fact meritorious and substantial, then the right to appeal a criminal judgment and/or sentence consists of little more than discretionary review.

If, for instance, there is a presumption against the use of secret proceedings, In re Taylor, 567 F.2d 1183, 1188 (2nd Cir. 1977), does a silent decision suffice to conclude that the presumption was overcome? If error is of constitutional dimensions does not a harmless error analysis require an explanation of the court's analysis? Sochor v. Florida, 504 U.S. 527, 540 (1992). If established precedence from the Court supports the issues raised, is not a court of appeals obliged to explain why those precedents are inapposite or do not require reversal?

In refusing to write an opinion the lower court cited 11th Cir. R. 36-1. (A-39). That rule sets out five circumstances where the court need not write an opinion if it deems that an opinion would have no precedential value. But, circumstance (a) is inapplicable because the district court made no factual findings with respect to any of the issues. Circumstance (b) was inapplicable because no sufficiency of the evidence issue was raised. Circumstances (c) and (d) are inapplicable inasmuch as this case did not involve an administrative agency, nor was it an appeal from a summary judgment, directed verdict or judgment on the pleadings. That leaves circumstance (e).

Circumstance (e) is subject to arbitrariness and contravenes Sochor, supra. It allows the court to dispense with writing an opinion where it determines that the "judgment has been entered without a reversible error of law." This phrase, however, allows the court to dispense with an opinion where there is constitutional error that the court considers to be harmless since such error is not considered "a reversible error of law." This would appear to contravene Sochor, supra, where the Court said that a constitutional harmless error analysis must be explained.

It is troubling that in a case where the district judge herself, on two occasions, commented on ". . . the complexities of the issues to be brought to this trial. . . .," (R85-97), such that ". . . they could teach an entire law school on this case. . .," (R84-25), the Court of Appeals would, nevertheless, deem that an opinion was nct merited.

Such cases as Smith v. United States, 502 U.S. 1017 (1991); Commissioner v. McCoy, 484 U.S. 3,7 (1987); Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978) and Taylor v. United States[4], 493 U.S. 906 (1989) clearly suggest that nonpublication of opinions is a recurring problem, one that, at least on one previous occasion, was squarely presented:

> Finally, petitioner questioned the validity of the Seventh Circuit's "unpublished opinion" rule. We leave these questions for another day.

Browder, 434 U.S. at 258, footnote 1.

See also *Appeals Courts Keep More and More Opinions Secret,* **The Wall Street Journal,** Wednesday, December 13, 1995:

> We expect our courts to build on prior decisions and to explain why not if they don't. If they select some decisions to be secret, or stamp them as second-class noprecedents--like Orwell's nonpersons--then judges themselves undermine the rule of law.

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[4] In Taylor, Justice Stevens, concurring in the denial of certiorari found it ". . . unfortunate that the summary disposition of petitioner's case by the Fifth Circuit and this Court may require petitioner to serve an 18-month prison sentence when the guidelines would specify a range between only 9 and 15 months. . . ." Id 907. In the instant case the difference is not one of three months, but six years.

That "other day," we respectfully submit, has arrived.

For brevity's sake, Petitioner will not belabor the point as the importance of the question is further exemplified in the arguments supporting questions one, two and three, which arguments are incorporated within this question.

CONCLUSION

For the above reasons, Petitioner most respectfully urges the Court to grant certiorari in this cause on the questions presented.

Respectfully Submitted,

Anthony F. Gonzalez
701 N. Franklin Street
Tampa, Florida
(813) 224-0431
Florida Bar No. 127400
Attorney For Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[DO NOT PUBLISH]

No. 94-2343

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 12 1995
MIGUEL J. CORTEZ
CLERK

D.C. Docket No. 92-28-Cr-T-17(C)

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

CHARLES B. CORCES

Defendant-Appellant

Appeal from the United States District Court for the
Middle District of Florida

(September 12, 1995)

Before BIRCH and BARKETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R.36-1.[1]

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[1]11th Cir.R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by sustantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;
and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Judgment Entered: September 12, 1995
For the Court: Miguel J. Cortez, Clerk
By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: 12/7/95

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 18 1994
MIGUEL J. CORTEZ
CLERK

No. 94-2343

UNITED STATES OF AMERICA

Plaintiff-Appelle

versus

CHARLES V. CORCES

Defendant-Appellant

On Appeal from the United States District Court
for the Middle District of Florida

O R D E R:

Appellant's motion for access to sealed transcripts is carried with the case. Appellant should include in his brief any argument concerning the sealed transcripts. The government is directed to compile the sealed transcripts of all ex parte conferences between the Government and the district court, attach to the transcripts a sealed-document list or index itemizing the date and general subject of each transcript, and file an original and one copy of the sealed document list and sealed transcripts with the Clerk of the Court, at the time of the filing of their brief as Appellee.

/s/ Susan M. Black
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 12 1995
MIGUEL J. CORTEZ
CLERK

No. 94-2343

UNITED STATES OF AMERICA,

Plaintiff-Appelle

versus

CHARLES V. CORCES

Defendant-Appellant

Appeal from the United States District Court
for the Middle District of Florida

O R D E R :

Appellant's motion for access to sealed transcripts is DENIED.

/s/
United States Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: SEALED PROCEEDINGS
GRAND JURY INVESTIGATION GRAND JURY NO. 92-2-21

_____/

ORDER

This cause is before the Court upon the United States' motion to compel compliance with a grand jury subpoena directed to the records custodian of Charles Corces, P.A. The Government also filed a supplement to its motion. Charles Corces filed a memorandum in opposition to the motion to compel. On August 11, 1992 the Court heard oral argument on the United States' motion.

After due consideration, the Court finds that the objections raised in Corces' memorandum and those raised orally at the above hearing are not well founded. See Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed. 2d 98 (1988); In Re Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987). Thefore, the government's motion to compel is GRANTED. Notwithstanding the fact that the subpoena is directed to the records custodian for Charles Corces, P.A., Corces concedes that he is the actual custodian of any such records.

Corces has also raised the issue of attorney/client privilege. Based upon the evidence presented, the Court finds that Gregorio Ruiz-Rodriguez, David R. Murphey III, and Frances Conerly have waived their attorney/client privilege with respect to the documents described in the subpoena. Except for the records pertaining to the above three persons who have waived the attorney/client privilege, preliminary to any requirement that Corces comply with the production of documents pertaining to Corces' clilents who have not filed a waiver of their attorney/client privilege, the Court will require the procedure hereinafter provided to determine whether any such documents fall within the attorney/client privilege and should thus be excepted from the command of the subpoena.

Accordingly, it is ORDERED that:

1. As to the records described in the subpoena pertaining to Gregorio Ruiz-Rodriguez, David R. Murphey III, and Frances Conerly, Charles Corces shall appear before the grand jury in the basement of the United States Courthouse, Tampa, Florida, on Thursday, August 13, 1992 at 9:30 a.m., and produce the documents described in the subponea.

2. With regards to the documents described in the subponea pertaining to Daron Collado, Darius Hernandez, Lucio and Gerardo Rodriguez, Robert Lakotas, Jose Angel Rendon and Calixto Hernandez Silva, this matter is REFERRED to Magistrate Judge Thomas G. Wilson for the purpose of examining the documents and determining whether any of such documents fall within the attorney/client privilege and entering appropriate orders in connection therewith. Such proceedings conducted before the Magistrate Judge shall be in camera.

3. This Order and all materials pertaining to it shall be under seal.

DONE AND ORDERED, at Tampa, Florida, this 12th day of August, 1992.

/s/
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

RECORD EXCERPT OF ORAL ORDER
of
JUDGE KOVACHEVICH
(APPEARING AT R85-21-23)

THE COURT: All right, gentlemen, this is the Court's ruling. Number one, the Jury will be brought in and the Grand Jury Foreperson will come in here and will testify with regard to the response to the issuance of the subpoenas, which will be Court's Exhibit, for purposes of this argument, 11-A and C. The last comments that Mr. Kehoe makes are applicable here. A substitute custodian could have come in and could have responded to what it was that was made available as the custodian in custodial capacity. The Supreme Court cases are clear that that does not constitute self incrimination. Anything beyond the area of inquiry of what has happened to those items that are subpoenaed would in fact than perhaps go into your area of self incrimination, but certainly, explanation with regard to what has happened to those documents is not a problem. Mr. Kehoe.

MR. KEHOE: I'm sorry, Your Honor, just what has happened to these documents?

THE COURT: Well, if your subpoena is issued, for example, your asking for calenders. Were there any calenders. In response to it, none. If that's the answer, then what records if any existed, are they burned, burglarized, the rest of that, some explantion as to what has happened to records if they did in fact exist. If they never existed, that's another reasonable inquiry to be made with regard to the person who has custody of records, not content of records, but existence of records or absence of existence. I think the Braswell case covered that. You have any problem with that Mr. Kehoe?

Mr. KEHOE: No, Your Honor, that's precisely what he was going to get into.

THE COURT: Now, if we have a problem with regard to proffer and answer given by the witness, I have no problems with the Grand Jury Foreperson coming in here and giving a proffer first, if that's what we want to do, and then if there's an objection,

I'll entertain it from Mr. Gonzalez and see if we're going adrift in the wrong direction. But it seems to me that if the Grand Jury Foreman is prepared to go forward and answer those questions and that's all you're going to ask, we can do it in front of the Jury. Do you have any problems with regard to doing it in front of the Jury or do you think we need to take a proffer, Mr. Kehoe?

MR. KEHOE: I don't see any problem with it at all, Your Honor, and I think we can just move ahead in front of the Jury.

THE COURT: Mr. Gonzalez, let me anticipate if your cross-examination of this Foreperson is going to get into areas that you feel are a problem, I can then let the jury go out then for a cross examination proffer if you feel that that is something you want to have, and I'll leave that to your discretion after you hear the direct. Is that all right, Mr. Gonzalez, that procedure?

MR. GONZALEZ: Judge, fine, as long as you know the record is clear that we believe all of it is compelling testimony that was not previously ordered.

THE COURT: I understand that. You're preserving your issue on this througout. Now, we're going to deal with the Grand Jury Foreperson, than who's coming next?

UNITED STATES DISTRICT COURT
MIDDLE District of FLORIDA

UNITED STATES OF AMERICA

V.

CHARLES CORCES
(Name of Defendant)

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)
CASE Number 92-28-CR-T-17

Anthony Gonzalez
Defendant's Attorney

THE DEFENDANT:

xxxwas found guilty on count(s) Three of the First Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

Title & Section	Nature of Offense	Date offense Concluded	Count Number(s)
18:USC:1951	Conspiracy to Extort Money Under Color of Official Right and by threat	01/91	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay special assessment of $50.00 for count Three which shall be due xxx immediatly.

IT IS FURTHER ORDRED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No:
261-31-8372
Defendant's Date
of Birth 04/16/55

March 11, 1994
Date of imposition of sentence

Defendant's Mailing address
c/o U.S. Marshal Service

/s/
Signature of Judicial Officer
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Defendant's Residence
Address
Same

March 14, 1994
Date

Defendant: CHARLES CORCES Judgment-page 2 of 5
Case Number: 92-28-Cr-T-17

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY ONE (121) MONTHS AS TO COUNT THREE WITH CREDIT FOR TIME SERVED.

xxx The Court makes the following recommendations to the Bureau of Prisons:
(1) Incarceration in State of Florida, preferably FCI Coleman.
(2) Federal Camp at Eglin Air Force Base, if eligible.
(3) Substance abuse counseling.
(4) Evaluation for academic pursuits; provide same.

xxThe defendant is remanded to the custody of the United States marshal.
_The defendant shall surrender to the United States marshall for this district.
a.m.
__at____p.m. on _____.
__as notified by the United States marshall.
__the defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
__before 2.p.m. on _____

___as notified by United States marshall
___as notified bythe probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____to_____at
_____with a certified copy of this judgment.

_____
United States Marshall
By_____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS AS TO COUNT THREE

While on supervised release, the defendant shall not commit any other federal, state, or local crime and shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgement imposes a restitution obligation, it shall be a condition of supervised release that the defendant shall pay any such restitutiojn that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

____ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ Defendant shall participate in the Home Detention program for a period of _____days\months. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

___ Defendant shall participate as directed in a program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

___ Defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer.
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) the defendant shall answer truthfully all inquiries by the probation office and follow the instructions of the probation officer.
4) the defendant shall support his or her dependants and meet other family responsibilities.
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment.
the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernelia related to such substances, except as prescribed by a physician, and shall submit to periodic unrinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit

him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy- two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be accasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirements.

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

OR

xxxx The court adopts the factual findings and guideline application of the presentence report except (see attachment, if necessay): The Court finds that Machin should not have been described as an "unindicted co-conspirator." The Court finds that Corces was a leader in the conspiracy and that a 4 level enhancement is appropriate. The Court finds the obstruction enhancement is not appropriate.

Guideline Range Determination By the Court:

Total Offense Level: 24
Criminal History Category I
Imprisonment Range: 51 to 63 months
Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000 to $ 100,000

xxx Fine is waived or is below the guideline range, because of the defendant's inability to pay.
Restitution $ 0

___ Fulll restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range
___ upon motion of the government, as a result of the defendant's substantial assistance.

xxx for the following reason(s): 5K2.0 - 6 levels added due to impact upon the Judicial System by defendant's gross abuse of the legal judicial system of the 13th Judicial Circuit, State of Florida.

UNITED STATES of America,
Plaintiff-Appellee,

v.

JOHN VALENTI and CHARLES CORCES, Defendants, TIMES PUBLISHING COMPANY, Intervenor-Appellant. IN RE: TIMES PUBLISHING COMPANY, Petitioner.

No. 92-3125, No. 92-3128

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

987 F.2d 708

Decided March 17, 1993
Rehearing En Banc Denied August 24, 1993.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 92-28-CR-T-17C. On Petition for Writ of Mandamus for the United States District Court for the Middle District of Florida. D.C. Docket No. 92-28-CR-T-17C. DISTRICT JUDGE: Kovachevich

DISPOSITION: AFFIRMED

Patricia Fields Anderson, George K. Rahdert, RAHDERT & ANDERSON, for Intervenor-Appellant.

Tamra Phipps, Walter Furr, Vicki Johnson, Assist. U.S. Attorneys for Plaintiff-Appellee

Before FAY and HATCHETT, Circuit Judges, and DYER, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this appeal involving important First Amendment issues, we survey the law regarding the closure of criminal proceedings, and hold unconstitutional the Middle District of Florida's sealed docket

in criminal cases.

BACKGROUND

On January 29, 1992, a grand jury indicted a Tampa, Florida criminal defense lawyer, Charles Corces, and an assistant state attorney, John Valenti, on charges of conspiracy, extortion, and bribery. The charges related to a previous state indictment for Corces's alleged bribery of Valenti in order to gain favorable treatment for criminal defendants in pending state prosecutions. Following the federal indictment, the state dismissed its indictment against Corces and Valenti.

Several months before trial, closed proceedings took place in the district court, including: (1) a February 14, 1992 partially ex parte, closed bench conference between the prosecutor and the district court, which resulted in a postponement of the trial date to May, 1992; (2) the government's March 18, 1992 ex parte, in camera motion; (3) the government's April 22, 1992, ex parte, in camera motion requesting a second continuance of the trial; (4) an August 13, 1992 closed conference between the prosecutor, defense counsel, and Corces before a United States Magistrate Judge; (5) the government's October 16, 1992 in camera motion; (6) an October 19, 1992 closed bench conference in open court, between the prosecutor, Corces, and defense counsel; (7) an October 19, 1992 ex parte, closed bench conferences with the government; (8) an October 19, 1992 closed bench conference with the prosecutor, Corces, and defense counsel where the government disclosed the contents of the earlier ex parte discussions; (9) an October 21, 1992 closed bench conference with the prosecutor, Corces and his counsel; (10) an October 21, 1992 closed bench conference where Corces filed under seal certain exhibits, which he had received in camera from the government; (11) an October 22, 1992 in camera proceeding where the district court heard testimony of an Assistant United States Attorney; (12) an October 22, 1992 ex parte, closed bench conference with the prosecutor; and (13) an October 15, 1992 in camera motion that the government filed seeking protection of discovery materials.

On October 20, 1992, a St. Petersburg Times (Times) news

reporter delivered a letter to the district court requesting transcripts of the October 19, 1992 proceedings be made available to the public, and requesting that all further proceedings be held in open court. On October 21, 1992, the district court returned the reporter's letter with a note from the clerk of the court directing the reporter to file a formal motion on these requests. On October 23, 1992, the Times filed an Emergency Motion to Intervene and Unseal Court Records and Request for Expedited Hearing ("emergency motion"). On October 26, 1992, the Times filed its Amended Emergency Motion, claiming that the district court had stymied its efforts to obtain accurate and timely information about the public corruption prosecution in violation of the Constitution and the common law.

On October 29, 1992, the district court granted the portion of Times's emergency motion seeking to intervene for the limited purpose of seeking to unseal the disputed court records. The district court also filed in camera certified questions to this court. On November 3, 1992, this court notified the district court that it would transfer the filing to the miscellaneous docket without further action because the law provides no basis for a response to the filing.

On November 6, 1992, the district court denied that portion of the Times's emergency motion seeking to unseal court records. The district court also directed the clerk of the United States District Court for the Middle District of Florida ("Middle District") to annotate any further closed proceedings in this case on the Middle District's public docket, rather than the usual annotations made only on the sealed docket.

ISSUES AND CONTENTIONS

The Times contends that the district court erred in conducting closed proceedings without first providing the public and press notice and opportunity to be heard, and articulating specific findings that justified closure of portions of the underlying criminal proceeding. The Times also contends that the district court erred in denying its emergency motion to unseal transcripts of previously held closed proceedings and several in camera documents. Additionally, the Times petitions this court to issue a writ of

mandamus, ordering the Middle District not to continue using both a public and a sealed docket in criminal proceedings. The government agrees that this case is not moot merely because the underlying trial has concluded in a mistrial. The government contends, however, that this court has no jurisdiction to review the use of a dual-docketing system in the Middle District because the district court has already fashioned a remedy in this case. In addition, the government contends that the district court did not abuse its traditional discretion to conduct closed bench conferences and properly denied the Times's emergency motion to unseal the disputed transcripts and in camera documents. We address these contentions separately.

APPELLATE JURISDICTION

We first note the Times's standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party. See In re Petition of Tribune Co. v. United States, 784 F.2d 1518, 1521 (11th Cir. 1986); Newman v. Graddick, 696 F.2d 796, 799-800 (11th Cir.1983). "An order denying access is not only reviewable by this court but is immediately reviewable regardless of the pendency of the underlying action." In re Petition of Tribune, 784 F.2d at 1521; see Newman, 696 F.2d at 800 (recognizing that orders denying press access and ongoing litigation are appealable under the collateral order doctrine). Although the Times's standing to seek immediate review is not contested, the parties disagree about the applicability of the mootness doctrine and its exceptions to this case.

The Times argues that this is a model case of the kind of constitutional wrong that is capable of repetition yet evading review. The government concedes that this case is not moot merely because the underlying prosecution has come to a conclusion, but argues that the "capable of repetition, yet evading review" exception to the mootness doctrine is inapplicable because the case is not yet moot. Rather, the government argues that the controversy in this case remains alive since the requested records remain sealed.

The Times requests relief broader in scope than merely unsealing the transcripts of closed proceedings in this case. The

Times also challenges the procedures for closure followed in the district court, and requests this court to strike the Middle District's dual-docketing system. Thus, the district court's November 6, 1992 order does moot that portion of this case relating to the district court's procedures for closure and its maintenance of a dual-docketing system. The district court directed the clerk to annotate any future closed proceedings on the public docket "in this particular case." The district court's order makes it clear that the instructions for complete public docketing apply only to this case.

Because this case presents a controversy capable of repetition yet evading review, we hold that mootness does not bar our review of the Times's claims against the dual-docketing system. See Newman, 696 F.2d at 800 (holding that mootness is not bar to review of a district court's order denying a newspaper access to judicial records and hearing, based in part on the district court's plans to maintain its policy of occasionally excluding the public and the press). Accordingly, we have jurisdiction to consider the merits of the Times's claims relating to closure procedures, the maintenance of the dual-docketing system, and the motion to unseal the closed proceedings in this case.

DISCUSSION

Prerequisites for Closure of Judicial Proceedings

The public and the press have a qualified constitutional right to attend criminal trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). The Supreme Court has emphasized the following two considerations for determining whether a First Amendment right of access attaches to a particular process within a criminal proceeding: (1) "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 8-9, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1 (1986) (Press-Enterprise II) (holding that the right of public access attaches to preliminary hearings based on these considerations); see also Press

Enterprise Co. v. Superior Court of California for Riverside County, 464 U.S. 501, 509, 104 S.Ct. 819, 823-24, 78 L.Ed.2d 629 (1984) (Press-Enterprise I) (holding that the right of public access attaches to the selection of jurors based on these considerations). "But even when a right of access attaches, it is not absolute." Press-Enterprise II, 478 U.S. at 9, 106 S.Ct. at 2740-41; see also Press Enterprise I, 464 U.S. at 509, 104 S.Ct. at 823-24 (recognizing that "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness").

Thus, in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise I, 464 U.S. at 510, 104 S.Ct. at 824 (stating that the lower court must articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered"); see Newman, 696 F.2d at 802; see also Globe Newspaper Co., 457 U.S. at 609 n. 25, 102 S.Ct. at 2620 n. 25 (recognizing that representatives of the press and the general public "'must be given an opportunity to be heard on the question of their exclusion'"); Gannett Co. v. De Pasquale, 443 U.S. 368, 401, 99 S.Ct. 2898, 2916, 61 L.Ed.2d 608 (1979) (Powell, J., concurring) (same). The opportunity for the press and the public to be heard on the question of their exclusion "extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public." See Gannett, 443 U.S. at 401, 99 S.Ct. at 2916.

(i) Closed Bench Conferences

The Times argues that the district court completely ignored the Press-Enterprise I and Newman procedural requirements before conducting closed bench conferences. The government responds that the district court properly exercised its traditional authority to conduct closed bench conferences, especially where

closure protects sensitive information concerning an ongoing criminal investigation. The government also argues that the district court's subsequent hearing and order on the Times's emergency motion was adequate to satisfy the principles articulated in Press-Enterprise I and Newman.

Contrary to the Times's argument, we do not interpret Press-Enterprise I to require a trial court to articulate findings that a closed bench conference is necessary and narrowly tailored to preserve higher values before a closed bench conference occurs. Instead, Press-Enterprise notes that a court may conduct an in camera conference on the record where the "constitutional value sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." Press-Enterprise I, 464 U.S. at 512, 104 S.Ct. at 825. In this process, the trial court balances the right of access against the interest in maintaining a sealed transcript. Press-Enterprise I, 464 U.S. at 512, 104 S.Ct. at 825. In placing a duty on the trial court to balance competing interests and make findings after the occurrence of a closed bench conference, the Court in Press-Enterprise I articulated a workable procedure to accommodate the public's right of access and the long recognized authority of a trial court to conduct bench conferences outside of public hearing. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n. 25, 102 S.Ct. 2613, 2620 n. 25, 73 L.Ed.2d 248 (1982) (holding that a trial court has traditional authority to conduct in camera conferences); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 2839 n. 23, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring) (stating that "the presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interest of decorum," including the exclusion of the public and the press from conferences at the bench and in chambers where such conferences are distinct from trial proceedings); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir.1977) (holding that "bench conferences between judge and counsel outside of public hearing are an established practice, ... and protection of their privacy is generaly within the court's discretion.... Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion"), cert. denied,

Miami Herald Publishing Co. v. Krentzman, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978), overruled in part on other grounds, Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Thus, we find no error in the district court's exercise of its traditional authority to conduct closed bench conferences. Our holding on this issue is bolstered in this case because the district court afforded the Times an opportunity to be heard on the release of the transcripts within a reasonable time.[1]

(ii) Sealed Transcripts and In Camera Motions

Even where a court properly denies the public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed. See Gannett, 443 U.S. at 393, 400, 99 S.Ct. at 2912, 2916. Thus, we review the district court's November 6, 1992 order denying the Time's emergency motion to unseal under the standards established in Press-Enterprise I. See United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir.1982) (holding that the denial of a motion to release transcripts of closed proceedings must itself satisfy the requirements for a denial of a right of access protected under the First Amendment). Accordingly, the district court's denial of the motion to unseal must be supported with a finding that the denial of access is necessary to preserve higher values, and is narrowly tailored to serve that interest. See Press-Enterprise I, 464 U.S. at 510, 104 S.Ct. at 824.

In its November 6, 1992 order, the district court identified the substantial probability of irreparable damage to a continuing law enforcement investigation as the compelling interest requiring a denial of the Times's motion for access to the in camera motions and the transcripts of the closed proceedings. The district court also ruled that "the alternative to closure will not adequately

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[1] Our holding also provides a workable method and a common sense solution to the closure problem. After all, a trial judge cannot rule intelligently until some information has been disclosed.

protect that interest and that there is a substantial probability that closure will be effective in protecting against the harm feared by the moving party." The Times argues that the district court's ruling is inadequate under the standards in Press-Enterprise I because protection of an ongoing law enforcement investigation is not a recognized compelling interest[2]. The Times also argues that the district court erred in failing to identify the alternatives to closure that it considered and rejected[3].

Based on our review of the sealed motions and transcripts, we hold that the district court properly denied the Times's emergency motion to unseal as a necessary means to achieving the government's compelling interest in the protection of a continuing law enforcement investigation. See In re Petition of the Tribune, 784 F.2d at 1522-23 (holding that a district court properly denied access to "bench conference transcripts based on the government's compelling interest in the protection of an ongoing collateral law enforcement investigation).

In addition, we hold that the district court did not err in failing to

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[2] We find the Times's argument that the district court erred in relying on 18 U.S.C. @ 3153(c)(1) to find a compelling and legitimate interest in sustaining a seal on the closed proceeding before the magistrate judge, to be completely without merit and warrants no discussion. See 18 U.S.C. @ 3153(c)(1) & (2) (1985).

[3] In addition, the Times argues that the district court's order is not narrowly tailored based on the absence of a ruling on how long the transcripts and in camera motions must remain sealed. This issue is not properly before this court because, as the Times concedes, the district court's November 6, 1992 order is silent on the time length of the seal. It would be premature for this court to consider a claim that the district court erred in permanently sealing the disputed motions and transcripts in the absence of such a ruling from the district court. Based on the November 6, 1992 order, the Times is not precluded from making a subsequent motion to unseal or a motion to amend due to changed circumstances in the ongoing law enforcement investigation.

specify which alternatives it considered before concluding that closure was necessary to protect the government's compelling interest. We note that the Times failed to suggest a logical and workable alternative for the district court's consideration, and also failed to suggest a workable alternative for this court's consideration in its brief or at oral argument. See Gannett, 443 U.S. at 401, 99 S.Ct. at 2916 (recognizing that those who object to closure have the responsibility of showing that reasonable alternatives are available to adequately protect the interest being considered). The only apparent alternative available to the district court in this case was the release of a redacted version of the sealed transcripts. We find, however, that the release of a redacted version of the transcripts would have been inadequate to protect the government's interest in the ongoing investigation at the time of the November 6, 1992 hearing. Accordingly, we find no error in the district court's failure to state specifically that it considered and rejected the alternative of releasing a redacted version of the transcripts, especially in light of the Times's failure to offer any alternative other than unsealing the disputed transcripts.

(iii) Sealed Docket

The Times argues that the Middle District's maintenance of the dual-docketing system denied it any meaningful opportunity to be heard on its exclusion from closed pretrial proceedings. The government responds that this court should avoid binding the district court to any formal procedure that is unduly burdensome. Although this court in Newman decided not to bind the district courts to the formality of any set procedure for closure, the Newman court did hold that "the issue [of closure] must be squarely confronted and those with various interest must be given the opportunity to be heard." Newman, 696 F.2d at 802. The Middle District's maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings. See CBS, Inc. v. District Court, 765 F.2d 823, 826 (9th Cir.1985) (noting that "a two-tier system, open and closed" erodes public confidence in the accuracy of records, and thus denies the public and press its right to meaningful access).

In this case, the sealed docket completely hid from public view

the occurrence of closed pretrial bench conferences and the filing of in camera pretrial motions. These events remained hidden until a Times reporter happened to be present to observe a closed bench conference. The Middle District's dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences. Thus, we hold that the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings.

CONCLUSION

We find no error in the district court's exercise of its traditional authority to conduct closed bench conferences, where the court later allowed the press an opportunity to be heard on the release of the transcripts to the closed proceedings within a reasonable time. See Press-Enterprise I, 464 U.S. at 512, 104 S.Ct. at 825. Based on the district court's findings and our review of the sealed transcripts, we affirm the district court's November 6, 1992 order denying the Times's emergency motion to unseal the transcripts of the closed bench conferences and in camera motions. We also hold that the Middle District's use of a public and a sealed docket to note criminal proceedings is an unconstitutional infringement on the right of the public and press to seek the release of in camera motions and transcripts of closed bench conferences[4].

AFFIRMED.

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[4] Having addressed the Times's claims for relief in this expedited appeal under the collateral order doctrine, we deny the Times's petition for a writ of mandamus. See United States v. Fernandez-Toledo, 737 F.2d 912, 919 (11th Cir.1984) (holding that a writ of mandamus is appropriate only for extraordinary situations where no other adequate means of obtaining relief is available).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2343

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 17 1995
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA

Plaintiff-Appelle

versus

CHARLES B. CORCES

Defendant-Appellant

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION (S) FOR REHEARING AND SUGGESTION (S) OF REHEARING EN BANC
(Opinion_____, 11th Cir.,19__, _____F.2d___).
Before: BIRCH and BARKETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/S/_____
UNITED STATES CIRCUIT JUDGE

FIFTH AMENDMENT UNITED STATES CONSTITUTION

Fifth Amendment to the Constitution of the United States which provides in pertinent part

> . . . nor shall any person. . . be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . .

SIXTH AMENDMENT UNITED STATES CONSTITUTION

Sixth Amendment to the Constitution of the United States which provides in pertinent part

> In all criminal prosecutions the accused shall enjoy the right to a . . . public trial. . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defence.

§ 3553. **Imposition of a sentence**

(a) **Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **Application of guidelines in imposing a sentence.**--The court shall impose a sentence of the kind, and within the range,

referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) **Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address

orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) **Limited authority to impose a sentence below a statutory minimum**.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) **Limitation on applicability of statutory minimums in certain cases**.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(5) not later than the time of the sentencing hearing, the

defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Sec. 3742. Review of a sentence

(a) **Appeal by a defendant**.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) **Appeal by the Government**.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) **Plea agreements**.--In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure--

(1) a defendant may not file a notice of appeal under

paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.--If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) **Consideration**.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for--

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) **Decision and disposition**.--If the court of appeals determines that the sentence--

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no

applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and–

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) **Application to a sentence by a magistrate**.--An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) **Guideline not expressed as a range**.--For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL*, (1994 Edition)

5k2.0 Grounds For Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable range, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2. 7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the

guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when the factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

§5K2.7 Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases intereference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

ELEVENTH CIRCUIT COURT OF APPEALS RULES

11th Cir.R. 36-1 Affirmance Without Opinion. When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous.

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by sustantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

FEDERAL RULE OF APPELLATE PROCEDURE 34(a)

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: GRAND JURY INVESTIGATION :
: GRAND JURY NO. 91-2-21
: UNDER SEAL USAO NO. 91-59468
:

RESPONSE TO SEALED MOTION TO COMPEL COMPLIANCE WITH GRAND JURY SUBPOENA BY RECORDS CUSTODIAN
And
Motion to Quash Subpoena

Corces, through undersigned counsel, files this as his response to the motion to compel compliance with Grand Jury Subpoena by Records custodian says and moves to quash said subpoena. In support hereof he would show:

I.

1. The prosecutors seek to do what the Supreme Court of the United States in United States v. Doe, 464 US 605, 79 L. Ed 2d 552, 104 S.Ct. 1237 (1984) has said they could not do, viz: force Corces to produce records and thereby, through such production, (1) implicitly admit the existence and possession of the documents and (2) implicitly authenticate the documents by identifying them as being genuine and as being the records requested, without providing him with a statutory grant of use immunity pursuant to 18 USCS §§ 6002 and 6003.

2. The specific holding rendered in Doe was:

> The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of immunity pursuant to 18 USCS §§ 6002 and 6003 [18 USCS §§ 6002 and 6003].
>
> 465 U.S. 617, 79 L Ed 2d at 563

Should there be any doubt that this was the specific holding of the Court, we would refer this court to the, concurring in part and dissenting in part, opinion of Justice Marshall, joined in by Justice Brennan wherein he says:

> I concur in the Court's affirmance of the Court of Appeals' ruling that the act of producing the documents could not be compelled without and explicit grant of use immunity pursuant to 18 USC §§ 6002 and 6003. . .
>
> 465 U.S. at 618, 79 L. Ed. 2d at 564

and the, concurring in part and dissenting in part, opinion of Justice Stevens wherein he says:

> The question in this case is whether, without tendering statutory immunity, the Government can compel the sole proprietor of a business to produce incriminating records pursuant to a grand jury subpoena.
>
> 465 U.S. at 620, 79 L.Ed. 2d at 565
> (emphasis supplied)

3. In the instant case, the prosecutors have not tendered statutory immunity. Neither in their motion to compel nor in their supplemental motion do they mention §§ 6002 and 6003. They simply want this court to compel Corces to produce records without receiving the use immunity to which he is entitled and which must be tendered through §§ 6002 and 6003. This is clear because in Doe:

> The Government did state several times before the District Court that it would not use respondent's act of production against him in any way. But counsel for the Government never made a statutory request to the District Court to grant respondent use immunity. We are urged to adopt a doctrine of constructive use immunity. Under this doctrine, the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against

the person claiming the privilege even though the statutory procedures have not been followed.

465 U.S at 616, 79 L. Ed 2d at 562.

The Court rejected this suggestion outright, saying:

> We decline to extend the jurisdiction of courts to include prospective grants of immunity in the absence of a formal request that the statute so requires.

465 U.S. at 616, 79 L. Ed. 2d at 562

II.

THE PROSECUTOR'S FOREGONE CONCLUSION ARGUMENT

1. Recognizing that the act of producing has ". . . testimonial aspects and an incriminating effect", Doe, 465 U.S. at 612, 79 L.Ed. at 560, the prosecutors seek to avoid the tendering of use immunity by arguing that the existence of the documents is a foregone conclusion and the production of them involves nothing of independent testimonial significance. They argue that, as anyone knows, lawyers keep records; consequently, their existence is a "foregone conclusion." Citing Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed. 2d 39 (1976) they argue that where the existence of records is a "foregone conclusion" the grand jury can compel their production.

2. The prosecutors' argument is flawed in several aspects. First, while it may be true that anyone knows that lawyers keep records so does anyone else keep records. That fact alone would not satisfy the "foregone conclusion" concept. The prosecutors know this, and know that the "foregone conclusion" concept was not meant to apply in such a broad manner. It was meant to apply, if at all, only where the existence of the specific documents is a forgone conclusion. The instant subpoena requires production of specific records. It is not a foregone conclusion, for instance, that the law firm of Charles B. Corces is in possession, or has ever been in possession, of records and files pertaining to one Frances Conerly or to one Calixto Hernandez Silva, or that any such records actually exist, to randomly select two names utilized in the subpoena. The act of producing them would admit their

existence and possession.

Second, the prosecutors neglect to point out that Doe specifically places upon the prosecutors the burden of ". . . producing evidence that possession, existence and authentication are a 'foregone conclusion.'" Doe footnote 13. (emphasis supplied) The prosecutors' attempt to avoid having to produce evidence, not assumptions, but evidence, through such an argument is patently flawed.

Third, to the extent that the argument that all lawyers keep records can to any degree support the proposition that, for that reason the specific records exist, and that the Corces has possession of them, it does not answer the second problem: authentication. Even were it to be assumed that the subpoenaed records exist - which is not admitted - and that Corces has possession of them - again not admitted - it does not establish that the government could authenticate them at trial independent of their production as records being kept by Corces. See Fed Rules of Evidence 901.

III.
CONTENTION THAT CORCES HAS FAILED TO COMPLY WITH HIS DUTIES AS A SUBPOENAED WITNESS

The subpoena was served on the records custodian. Corces appeared as records custodian as directed by the subpoena. When he was asked incriminating questions he asserted, as he had a perfect right to assert, his rights under the Fifth Amendment to the Constitution of the United States. The government had its remedy. It could have taken the matter before this court pursuant to §§ 6002 and 6003; or, if the government did not believe that the questions that were asked were incriminating it could have requested a show cause order to establish to compel answers to those questions asked before the grand jury. They chose not to do so.

This was not a situation in which an ordinary witness was appearing before the grand jury. It was one where the alleged target of the investigation was required to appear, one that already stood indicted. The argument that the government makes was

rejected by the court in Argomaniz, infra:

> . . . Armogomaniz did not refuse to comply with the summons in a blanket manner. Instead, Argomaniz followed the general rule that a taxpayer "must present himself with the records for questioning and as to each question and each record elect to raise or not to raise the defense." *Id* . . . When the IRS officer realized that Argomaniz would raise the privilege in response to each of her document requests and to each of her questions concerning Argomaniz's tax liability for the years in question the IRS officer terminated the interview.
>
> Argomaniz 925 F. 2d at 1356

The government has not seen fit to provide either the undersigned nor this court with a copy of the transcript of the questions and answers in the grand jury proceedings. We are sure that if the government felt that none of the questions tended to incriminate it would have post haste caused the testimony to be transcribed and asked for a show cause order.

IV.

THE CONTENTION THAT CORCES BEARS THE BURDEN OF ESTABLISHING THAT THE ACT OF PRODUCING WOULD INCRIMINATE

Again relying on Argomaniz, United States v. Argomaniz, 925 F. 2d 1349 (11th Cir. 1991), the prosecutors argue that Corces[5] has the burden of establishing that the act of producing would tend to incriminate him because ". . . his say-so does not of itself establish the hazard of incrimination." Id 1355. But, this is not Corces' say-so. This is the government's say-so. It is the

---

[5] Significantly, the prosecutors continue to intertwine Corces and custodian. First, they suggest that they subpoenaed the custodian, not Corces, then they say that "[t]he Court should require Corces to provide it. . . " (i.e. the incriminating reasons) so that this court can evaluate the Fifth Amendment claims as to each document. (Government's motion p. 5).

government who announced in the "FACTUAL BACKGROUND" of its motion that Corces has been indicted and it is the government who announced therein that "[t]he grand jury has continued to investigate Charles B. Corces . . . " and it is the government who seeks those records in an attempt to further incriminate him.

In Argomaniz the IRS had sought to compel Argomaniz to produce documents at an IRS civil proceeding. Argomaniz appeared in compliance with the summons, but refused to produce the summoned documents. The government argued that the court should not accept Argonamiz's say-so that production would be incriminating. The Court of Appeals Eleventh Circuit emphasized that more than mere speculative, generalized allegations are required to assert the privilege, that

> [t]he taxpayer must be faced with substantial and real hazards of self incrimination.
>
> Id at 1353

Nevertheless, recognizing that IRS's "criminal and civil elements are inherently intertwined," id at 1353, and that "tax investigations frequently lead to criminal prosecutions," id at 1354, the court further recognized that "[t]here can exist a legitimate fear of criminal prosecution while an IRS investigation remains in the civil stage. . . " Id at 1353. Consequently,

> Argomaniz had "shown more than a generalized fear of criminal prosecution" and had "good reason to believe that his answers might tend to incriminate him."
>
> Id at 1355.

While the Argomaniz panel did remand for an *in camera* question by question analysis of the questions propounded by the IRS examiner concerning whether they tended to incriminate, in Argomaniz there was no announced intention by the government to prosecute, as has occurred in the instant case. In the instant case not only has Corces been indicted, but the government has by way of motion promised to supersede the indictment with further charges and is seeking to obtain these records to incriminate him. If that does not create a substantial and real

hazard that any question that Corces may be asked would tend to incriminate him, then there is no Fifth Amendment.

VI.

The Contention That No Records Are covered By the Attorney Client Privilege

The government jumps the gun by assuming that Corces is not asserting the attorney client privilege. All that has occurred in the instant case is that Corces appeared before the grand jury and asserted his privilege against self incrimination. It never reached the point where it was necessary to assert the attorney client privilege. At the proper time, if it should arise, all matters concerning the attorney client privilege will be raised.
Now, for the first time the government informs that it has recorded waivers with respect to the David R. Murphey, Frances Conerly and Gregorio Ruiz-Rodriguez. (Government's motion p. 6). If, aside from the Fifth Amendment claim, the government can produce valid waivers that will satisfy this court then it would seem that Corces would be protected by any judicial declaration that the attorney client privilege has been waived by those clients and that Corces should be compelled to divulge those communications.

As to the other "clients" listed - and by these means Corces does not admit that any or all are or were clients - the government asserts that the subpoena only ". . . seeks fee and appointment information, but nothing that would disclose Corces' confidential advice to a client." (Government's motion p. 6). The government should re-read its subpoena. It does not say that it seeks only fee and appointment information with respect to Collado, Hernandez, Lucio and Gerardo Rodriguez, Lakotas, Rendon and Silva. It requires production of all records and files of any sort pertaining to the three who allegedly have recorded waivers, including billing records, plus the records pertaining to the last seven names. There is no limitation as to what is requested with respect to the "other" seven named persons.

Nevertheless, since the government has now announced that it only wants the fee and appointment information with respect to the "other[s]" we will assume that no other information need be provided, assuming production is compelled.

VII.
APPOINTMENT OF A RECORDS CUSTODIAN

Finally, the government asks this court to compel Corces to appoint another records custodian as discussed in In Re Grand Jury No. 86-3 (Will Roberts Corporation), 816 F. 2d 569 (11th Cir. 1987), hereinafter referred to as Roberts and In re Two Grand Jury Subpoena Dated August 21, 1985 v. Doe, 793 F. 2d 69 (2nd Cir. 1986), hereinafter referred to as Two.

The problem is that there are several essential distinctions between those two cases and the instant case. First, Roberts did not involve a law firm, it involved a solely owned corporation. A law firm has the duty of protecting the attorney client privilege of its clients. No such problem arose in Roberts because it was not a law firm. If Corces, as sole proprietor of his law firm, turns over his records to a record custodian then he will be divulging matters to that custodian which fall within the attorney client privilege. Even more compelling, is the fact that the custodian will be unable to discern which matters fall within the attorney client privilege at the point he turns over the documents to the grand jury.

Second, even Roberts recognized that there would be authentication problems subject to the privilege where the subpoena requested matters that ". . . would require an inquiry into Robert's thought processes. . . ." Id 573. Since Corces is the sole proprietor of his law firm and since he is its only custodian the very act of turning over the documents to another records custodian would itself constitute authentication which would incriminate Corces, individually. The government need not do more at a trial than call the custodian to authenticate the documents as coming from Corces, the previous custodian, inasmuch as the identification of the documents to the custodian involves a thought process on the part of Corces.

Now, Two did involve a law firm. But, in that case the subpoena was limited to documents relating to fee arrangements and disbursement of funds some of which were required by New York law to be kept by the law firm and filed with the Office of Court Administration. (retainer agreements and closing statements). While the attorney client privilege does not generally

protect information concerning client awards and fee arrangements or pleadings, such as statements of particulars filed in court or furnished to opposing counsel, the instant subpoena is not so limited. It requests ". . . any and all records and files of any sort. . ."pertaining to the named persons. Without question this includes matters that are not a "foregone conclusion" - and includes matters that involves the attorney client privilege.

Additionally, the court in Two determined that the law firm was a collective entity both before and after incorporation inasmuch as the firm employed as many as fourteen (14) lawyers at one time. As stated in Two:

> The critical issue is whether the organization had an institutional identity separate from that of its individual members.
>
> Two at 72

In the instant case the Corces law firm has no institutional identity separate from Corces himself. In their supplemental motion, the prosecutors state that Corces was incorporated on September 27, 1990 and will so remain until at least October 1992. They also state that he was incorporated from August 1985 to November 1987.

But, the subpoena is not limited to documents during which he was incorporated. According to the government's own statement Corces was not incorporated between November of 1987 and September of 1990. Yet, the subpoena does not pretend to exclude those years. In fact it requests documents from 1984 to 1991, inclusive. Finally, we would submit that the precepts of neither Roberts nor Two are applicable to the instant case. The crux of those cases is that since the Fifth Amendment protects only natural persons, not organizations or collective entities, Bellis v. United States, 417 U. S. 85, 40 L Ed 2d 678, 94 S Ct 2179 (1974) (a three man law firm is a collective entity), a solely owned corporation may not assert the privilege. In Roberts, however, the corporation could exist and function without Roberts. His heirs could inherit the stock in the corporation and continue with the business. In Two the law firm could exist and function without any one of the individual partners. It was a collective entity

because others were involved in the firm. In the instant case, the Corces law firm could not exist without Corces inasmuch as a professional license is required for professional associations, Florida Statute 621.03, 621.05 & 621.06, and should Corces demise the law firm could not exist as a separate entity apart from him as a natural person. The Corces law firm simply has no institutional entity separate and apart from Corces as a natural person.

It should be beyond dispute that Corces is a natural person. As such, he can assert his Fifth Amendment rights. When, as custodian of a law firm of which he is the only attorney, is subpoenaed to admit the existence of documents and to authenticate them, he is being asked to incriminate himself, not the law firm, but himself.

IX.

The Subpoena Is Too Broad, Intended To Harass and Is Being Used As Discovery In Pending Case

It is submitted that the subpoena:

1. Is overly broad, sweeping, unreasonable, vague, indistinct and indefinite,

2. could not reasonably be relevant to any pending inquiry by the Grand jury,

3. has been requested and is being used to harass Corces,

4. requests records, documents and files protected by the attorney-client privilege, and

5. is being improperly used by the prosecutor to gather evidence for use in a case for which an indictment has already issued.

In support hereof, movant would show:

(a) In case no. 92-28 Cr-T-15 (c), Corces stands charged with conspiracy to extort (Count I), attempted extortion (Count II)

and solicitation of a bribe, (Count III). Said counts are alleged to have occurred on or about January 15, 1991.

(b) The government makes no attempt to exclude records and files relevant to the cause under indictment from its subpoena. The fact is that the subpoena requests appointment books and calendars from 1984 to 1991, inclusive, yet in the government's very motion to compel it alleges that the grand jury ". . . investigation includes allegations that Charles B. Corces engaged in a string of briberies in state court from 1990 to 1991." If this is true, then records between 1984 and 1990 are not relevant to the grand jury investigation; nor are records after January 15, 1991.

(c) We recognize that while it is improper for the government to utilize the grand jury for the sole or dominating purpose of preparing an already pending indictment for trial, in the absence of a factual showing there is a presumption of regularity of grand jury proceedings. Nevertheless we submit that such a presumption is inappropriate in the instant case. In his pending case Corces has filed a motion to dismiss, predicated on serious acts of prosecutorial misconduct. This court is referred to said motion. Pending such allegations - none of which have been denied by the prosecutors in their response to the motion - such a presumption should be deemed inappropriate. There are instances where the timing, circumstances and reach of the subpoena casts significant light on its purposes. In Re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels) 767 F 2d 26 (2nd Cir. 1985)

. . If, however, this court deems that there is insufficient showing to overcome that presumption it is requested that the court bar use of any documents produced at the trial of which Corces stands presently indicted or which may arise from the facts surrounding that indictment. See Simels, supra. at 30.

(d) The subpoena directs the custodian to bring all records and files of any sort with respect to three named "clients" including statements. Thus it requires the custodian to bring all records files and statements of clients regardless whether doing so would infringe upon the attorney-client privilege

(e) In addition to requiring the production of certain records concerning the three named "clients" the subpoena also directs that the same types of records, "statements" included, be produced with respect to other named individuals without identifying said individuals as clients, witnesses or prospective witnesses. The production of "statements" by witnesses or prospective witnesses is prohibited by Federal Rule of Criminal Procedure 17 (h).

X.

CUSTODIAN SHOULD BE ALLOWED TO REDACT

Finally, should this Honorable court deem that Corces be compelled to appoint another custodian, said custodian should be allowed to submit redacted documents so as to remove from any and all ledgers, accounts or documents, the names and information pertaining to any and all other persons or individuals whose names are not listed in the subpoena.

Respectfully Submitted,

/s/_____
ANTHONY F. GONZALEZ, ESQUIRE
701 N. Franklin Street
Tampa, Florida
(813) 224-0431
Florida Bar Number 127400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to motion to compel and Motion to Quash subpoena has been furnished to the Office of the United States Attorney, 500 Zack Street, 4th Floor, Tampa, Florida, 33602, this 27th day of July, 1992.

/s/_____
ANTHONY F. GONZALEZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 94-2343

UNITED STATES of America

Plaintiff-Appellee,

vs.

CHARLES B. CORCES

Defendant-Appellant

MOTION FOR ORDER REQUIRING ACCESS TO TRANSCRIPTS

Appellant moves this Honorable Court for an order requiring the lower court to allow appellant access to certain transcripts from which he has been denied access for the purpose of this appeal and in support thereof would show:

1. Appellant is being denied a copy of, or access to, the following transcripts of reported *ex parte* proceedings, the vast majority, if not all, of which are *ex parte* proceedings between the lower court and prosecutors with respect to the this case and to which appellant needs access in order to intelligently present and argue his issues on appeal: Volumes 12-A; 21- A & C 23 - A, B, C, & D; 25- A, B, & C; 26- A & B; 27-A & B; 37- A; 38 - A; 39- B; 42 - A & C; 43 - A.

2. Appellant has repeatedly either objected to these *ex parte* communications and/or has alternatively requested transcripts of these conferences as this Court has, on at least one previous occasion, required, See Paradyne Corporation v. Siegrist, 803 F. 2d 604, 612 (11th Cir. 1986), but to no avail. See for example exhibit "A." One last attempt made in the lower court was via a Motion For Copy of Sealed Docket Sheet Lit which was stamped denied. See exhibit "B."

3. Appellant represents that several of the issues which he intends to present in this appeal involve representations made by prosecutors to the judge below and without access to those representations it will be impossible to adequately present and argue those issues and argue, if such be the case, that whatever representations were made by federal prosecutors were inadequate, incomplete, incorrect or irrelevant to the specific issue. Additionally, there appear to be other communications and/or representations made to which neither appellant and/or his counsel were privy and which in themselves might constitute issues on appeal.

Respectfully Submitted,

ANTHONY F. GONZALEZ, ESQUIRE
701 N. Franklin Street
Tampa, Florida
(813) 224-0431
Florida Bar Number 127400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion For Order Requiring Access To Transcripts has been furnished to the Office of the United States Attorney, 500 Zack Street, 4th Floor, Tampa, Florida, 33602 by United States Mail, this ____day of June, 1994.

ANTHONY F. GONZALEZ

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES
OF AMERICA :

:

V. : CASE NO.
92-28-Cr-T-17 (B)

CHARLES B. CORCES :

MOTION FOR COPY
OF
SEALED DOCKET SHEET LIST

The defendant moves this court for an order allowing the Clerk of this Court

(1) to supply the undersigned counsel with a copy of the Sealed Docket Sheet List,

and

(2) to open up the Sealed Docket Sheet to the defendant.

Should this court consider not to allow (2) above that (1) above be granted.

In support hereof the defendant would show:

1. Ms. Susan Taylor of the Clerk's office continues to inform that, as previously ordered by this court, she cannot provide this office with a copy of the Sealed Docket Sheet List without prior order from this court.

2. The defendant contemplates using said list in a motion to be filed in the Court of Appeals, Eleventh Circuit.

3. Additionally, the defendant represents that it is impossible, on appeal, in the preparation of his brief for this defendant to argue, refute, correct or explain any of the representations or allegations made by the government via their *ex parte* pleadings, testimony or representations to this court without reviewing what was done, said or represented.

Respectfully Submitted,

ATHONY F. GONZALEZ, ESQUIRE
701 N. Franklin Street
Tampa, Florida
(813) 224-0431
Florida Bar Number 127400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion For Copy of Sealed Docket Sheet List has been furnished to the Office of the United States Attorney, 500 Zack Street, 4th Floor, Tampa, Florida, 33602 by United States Mail this 25 day of March, 1994.

ANTHONY F. GONZALEZ

DENIED AND SO ORDERED THIS
30TH day of MARCH 1994
/S/
ELIZABETH KOVACHEVICH
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA :

VS. : CASE NO.
92-28-Cr-T-17(B)

CHARLES B. CORCES :

FIRST SUPERSEDING INDICTMENT

The Grand Jury Charges:

COUNT ONE

A. INTRODUCTION

At all times material to this Indictment:

1. CHARLES B. CORCES was an attorney engaged in the private practice of law, whose practice included representing criminal defendants in cases pending in the Thirteenth Judicial Circuit, in Hillsborough County, Florida.

2. John S. Valenti was an agent of the State of Florida employed as an assistant State Attorney for the Thirteenth Judicial Circuit in Hillsborough County.

B. THE ENTERPRISE

CHARLES B. CORCES, John S. Valenti and other persons known and unknown to the grand jury were involved in criminal cases within the Circuit and County Court system in Hillsborough County, Florida. This court system constituted an "enterprise" under Title 18, United States Code, Section 1961 (4). The enterprise affected interstate and foreign commerce.

C. THE MANNER AND MEANS OF THE ILLEGAL CONDUCT.

It was a part of the illegal conduct herein charged that:

1. CHARLES B. CORCES engaged in "fixing" criminal cases illegally, for a fee, using his friendship and relationship with Assistant States Attorney John S. Valenti.

2. CHARLES B. CORCES, used bribery and gratuities to arrange criminal cases for his clients and others through the

prosecutor Valenti. Corces' conduct arose from his severe financial difficulty caused by excessive debt and susbstance abuse. This conduct was part of an ongoing pattern which included CHARLES B. CORCES and others involved in criminal cases in Hillsborough County.

3. CHARLES B. CORCES made a concerted effort over time to engage his friend Valenti in accepting payments for the favorable disposition of criminal cases, beginning with a discussion about the practice in or about 1984.

4. CHARLES B. CORCES' illegal payments to the prosecutor Valenti included a range of cases from first degree murder to a misdemeanor. These cases involved various clients and other persons.

D. THE RACKETEERING CONSPIRACY

From in or about 1984 until in or about 1991, in the Middle District of Florida and elsewhere, the defendant,

CHARLES B. CORCES,

being a person associated with the enterprise, which enterprise was engaged in, and the acts of which, affected interstate and foreign commerce, did knowingly and intentionally combine, conspire and agree with John S. Valenti and with persons known and unknown to the grand jury to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

It was the object of this agreement to participate in the affairs of the enterprise through the commission of a pattern of racketeering activity as set forth in Count Two, paragraph B, which consisted of attemped extortion and conspiracy to commit extortion affecting interstate commerce under color of official right, in violation of Title 18, United States Code, Sections 1951 and 2, as well as the commission of acts involving bribery, in violation of Florida Statutes, Sections 838.015 and 838.016, by indicted and unindicted co-conspirators.

It was a part of this conspiracy that the co-conspirators agreed that two or more acts of racketeering would be committed in the conduct of the affairs of the enterprise.

In violation of Title 18, United States Code, Section 1962 (d).

COUNT TWO

A. THE SUBSTANTIVE RACKETEERING VIOLATION

1. The Introduction, Enterprise, and Manner and Means sections alleged in Count One of this Indictment and set forth

above are incorporated by reference and set forth by means of this Count.

2. From in or about 1990 to in or about 1991, in the Middle District of Florida and elsewhere,

CHARLES B. CORCES

being a person associated with the enterprise, which enterprise affected interstate and foregin commerce, knowingly and intentionally conducted and participated, directly and indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity, as set forth below.

B. RACKETEERING ACTS

Racketeering Act No. 1

CHARLES B. CORCES committed the following acts, any one of which alone constitutes the commission of Racketeering Act No. 1:

A. The violation of Title 18 United States Code, Sections 1951, as set forth in Count Three below.

B. The violation of Title 18, United States Code, Sections 1951 and 2, as set forth in Count Four below.

C. In or about January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit, to wit, money; with an intent or purpose to influence the performance of a an act or omission, to wit: the disposition of the case State of Florida v. Nelson Gonzalez, No. 90-8716, which CHARLES B. CORCES believed to be, or the said public servant represented as being, within the official discretion of the said public servant, in violation of a public duty, or in performance of a public duty, contrary to Florida Statutes, § 838.015.

D. In or about January 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future performance, nonperformance, or violation of any act or omission which CHARLES B. CORCES believed to have been, or John Valenti represented as having been, either within the official discretion of John Valenti, in violation of a public duty, or in performance of a public duty in the case State of Florida v. Nelson Gonzalez, No. 90-8716, contrary to Florida Statutes § 838.016(1).

E. In or about January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission that CHARLES B. CORCES believed to have been, or which was represented to CHARLES B. CORCES as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty in the case of State of Florida v. Nelson Gonzalez, No. 90-8716, contrary to Florida Statutes § 838.016(2).

Racketeering Act No. 2

CHARLES B. CORCES committed the following acts, any one of which alone constitutes the commission of Racketeering Act No. 2.

A. In or about November, 1990 through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer and promise to a public servant, Assistant State Attorney, John S. Valenti, a pecuniary or other benefit, to-wit money; with an intent or purpose to influence the performance of an act or omission, to wit: the disposition of the case State of Florida v. Lucio Rodriguez and Gerardo Rodriguez, No. 90-17811, which CHARLES B. CORCES believed to be, or the said public servant represented as being, within the official discretion of the said public servant, in violation of a public duty, or in performance of a public duty, contrary to Florida Statutes, § 838.015.

B. In or about November, 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future performance, nonperformance, or violation of any act or omission which CHARLES B. CORCES believed to have been, or John Valenti represented as having been, either within the official discretion of John Valenti, in violation of a public duty, or in performance of a public duty in the case State of Florida v. Lucio Rodriguez and Gerardo Rodriguez, No. 90-17811, contrary to Florida Statutes §

838.016(1).

C. In or about November, 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to wit: money; for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission that CHARLES B. CORCES believed to have been, or which was represented to CHARLES B. CORCES as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty in the case of State of Florida v. Lucio Rodriguz and Gerardo Rodriguez, No. 90-17811, contrary to Florida Statutes § 838.016(2).

Racketeering Act No. 3

CHARLES B. CORCES committed the following acts, any one of which alone constitutes the commission of Racketeering Act No. 3:

A. In or about April 1990 through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit, to-wit, money; with an intent or purpose to influence the performance of an act or omission, to-wit: the disposition of the case State of Florida v. David R. Murphey, Nc. 90-8663, which CHARLES B. CORCES believed to be, or the said public servant represented as being, within the official discretion of the said public servant, in violation of a public duty, or in performance of a public duty, contrary to Florida Statutes, § 838.015.

B. In or about April, 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future performance, nonperformance, or violation of any act or omission which CHARLES B. CORCES believed to have been, or John Valenti represented as having been, either within the official discretion of John Valenti, in violation of a public duty, or in performance of a public duty in the case State of Florida v. David R. Murphey, No.

90-8663, contrary to Florida Statutes § 838.016(1).

C. In or about April 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to wit: money; for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission that CHARLES B. CORCES believed to have been, or which was represented to CHARLES B. CORCES as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty in the case State of Florida v. David R. Murphey, No. 90-8663, contrary to Florida Statutes § 838.016(2).

Racketeering Act No. 4

CHARLES B. CORCES committed the following acts, any one of which alone constitutes the commission of Racketeering Act No. 4:

A. In or about June, 1990, through September 1990, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit, to-wit, money; with an intent or purpose to influence the performance of an act or omission, to-wit: the disposition of the case State of Florida v. Francis Conerly, No. 90-9533, which CHARLES B. CORCES believed to be, or the said public servant represented as being, within the official discretion of the said public servant, in violation of a public duty, or in performance of a public duty, contrary to Florida Statutes, § 838.015.

B. In or about June, 1990, through September, 1990, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney, John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future performance, nonperformance, or violation of any act or omission which CHARLES B. CORCES believed to have been, or John Valenti represented as having been, either within the official discretion of John Valenti, in violation of a public duty, or in performance of a public duty in the case State of Florida v. Francis Conerly, No. 90-

9533, contrary to Florida Statutes § 838.016(1).

C. In or about June, 1990, through September, 1990, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney, John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission that CHARLES B. CORCES believed to have been, or which was represented to CHARLES B. CORCES as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty in the case of State of Florida v. Francis Conerly, No. 90-9533, contrary to Florida Statutes § 838.016(2).

Racketeering Act No. 5

CHARLES B. CORCES committed the following acts, any one of which alone constitutes the commission of Racketeering Act No. 5:

A. In or about September, 1990 through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES, did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney, John S. Valenti, a pecuniary or other benefit, two-wit, money; with an intent or purpose to influence the performance of an act or omission, to-wit: the disposition of the case State of Florida v. Gregorio Ruiz-Rodriguez, No. 87-15300, which CHARLES B. CORCES believed to be, or the said public servant represented as being, within the official discretion of the said public servant, in violation of a public duty, or in performance of a public duty, contrary to Florida Statutes, § 813.015.

B. In or about September, 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit not authorized by law, to-wit: money; for the past, present, or future performance, nonperformance, or violation of any act or omission which CHARLES B. CORCES believed to have been, or John Valenti represented as having been, either within the official discretion of John Valenti, in violation of a public duty, or in performance of a

public duty in the case State of Florida v. Gregorio Ruiz-Rodriguez, No. 87-15300, contrary to Florida Statutes § 838.016(1).

C. In or about September, 1990, through January, 1991, in Hillsborough County, Florida, CHARLES B. CORCES did commit an act involving bribery, that is, did corruptly give, offer, and promise to a public servant, Assistant State Attorney John S. Valenti, a pecuniary or other benefit, to-wit: money; for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission that CHARLES B. CORCES believed to have been, or which was represented to CHARLES B. CORCES as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty in the case of State of Florida v. Gregorio Ruiz-Rodriguez, No. 87-15300, contrary to Florida Statutes § 838.016(2).

All in violation of Title 18, United States Code Section 1962(c).

COUNT THREE

1. The Introduction and Manner and Means sections alleged in Count One of this Indictment and set forth above are incorporated and set forth by means of this Count.

2. In or about January, 1991, in the Middle District of Florida, the defendant,

CHARLES B. CORCES,

did knowingly, willfully and intentionally combine, conspire, confederate and agree with others known or unknown to the grand jury, to commit extortion, that is, to obtain and cause to be obtained property, to-wit: money, from Manuel A. Machin, Nelson Gonzalez and the family and relatives of Nelson Gonzalez, with the consent of Manuel A. Machin, Nelson Gonzalez, and the family and relatives of Nelson Gonzalez, such consent being obtained under color of official right, and by wrongful use of actual and threatened fear of additional incarceration of Nelson Gonzalez, which extortion affected commerce and the movement of articles and commodities in commerce.

All in violation of Title 18, United States Code, Section 1951.

COUNT FOUR

1. The Introduction and Manner and Means sections alleged in Count One of this Indictment and set forth above are incorporated and set forth by means of this Count.

2. In or about January, 1991, in the Middle District of Florida, the defendant,

CHARLES B. CORCES,

did knowingly, willfully and intentionally attempt and cause the attempt to commit extortion, in that the defendant did attempt and cause the attempt to obtain property, to-wit: money, from Manuel A. Machin, Nelson Gonzalez and the family and relatives of Nelson Gonzalez with the consent of Manuel A. Machin, Nelson Gonzalez and the family and relatives of Nelson Gonzalez, such consent being obtained under color of official right, and being induced by wrongful use of actual and threatened fear of additional incarceration of Nelson Gonzalez, in that the defendant wrongfully use, purported to use and exploit, wrongfully caused to be used, purported to be used and exploited, the official position of John S. Valenti, as an Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County to obtain and cause to be obtained a favorable plea agreement and sentence for Nelson Gonzalez in the first degree murder case State of Florida v. Nelson Gonzalez, No. 90-8716, Division B, which attempted extortion, if successful would have affected commerce and movement of articles and commodities in commerce.

All in violation of Title 18, United States Code Sections 1951 and 2.

A TRUE BILL

_____

ROBERT W. GENZMAN
United States Attorney

By: _____
WALTER E. FURR
Assistant U.S. Attorney
Chief, Drug Trafficking Section

By: _____
WILLIAM F. JUNG
Assistant U.S. Attorney

EXCERPTS - TESTIMONY
OF
RICHARD S. MARTIN, JR.
(Grand Juror)
(R85-32- 54)

BY MR. KEHOE:

Q Thank You, Your Honor. Good morning, Mr. Martin.

A Good morning.

Q Sir, what do you do for a living?

A. I'm a Marshal Arts instructor, I own a health club and I teach defensive strategy at the police academy.

Q And where is that club located?

A In Largo

Q And who do you teach Marshal Arts to --

A What --

Q Mr. Martin, you have to let me finish before you start so we don't lapse. Who do you teach Marshal Arts to.

A Civilians, I teach children, adults, men and women.

Q And how long have you been doing this?

A Twenty years.

Q Now Mr. Martin, for a period of time in your life were you Foreperson for a Federal Grand Jury here in this building?

A Yes, sir.

Q And would that have been Federal Grand Jury 91-2?

A Yes, sir.

Q And as part of your responsibilities, sir, as Foreman of the Grand Jury, do you essentially monitor the acitvities of the Grand Jury?

A Yes, sir.

Q Now, sir, let me direct -- by the way, how long were you the Foreperson of 91-2, approximately?

A For eighteen months.

Q And from when to when?

A November of 91 through April of '93

Q Now, Mr. Martin, during the period of time when you were the Foreperson of the Grand Jury, were several subpoenas issued by the Grand Jury for the custodian of records for the Law Office of Charles B. Corces?

A Yes, Sir.

Q And did an individual respond to that subpoena?
A Yes, sir.
Q And who was that individual that responded?
A That was Mr. Corces
Q Is that individual in the Courtroom here today?
A Yes, sir.
Q And can you point him out and describe what he's wearing?
A Yes, sir, he's sitting at the table over there.
Q The far right?
A Yes.

MR. KEHOE: Your Honor, let the record reflect the witness identified the Defendant.

THE COURT: Any objections, Mr. Gonzalez?

MR. GONZALEZ: None, Your Honor.

THE COURT: The record reflects the witness identified the Defendant Charles Corces. You may proceed.

BY MR. KEHOE:

Q Now, Mr. Martin, at the subpoena dated January 17th 1992, did the Grand Jury request all appointment books and calenders from 1984 to 1991 inclusive and all telephone and message logs from 1984 to 1991 inclusive? Was that the request made of the custodian of the Law Office of Charles B. Corces?
A Yes sir.
Q Did Mr. Corces produce certain documents to the Grand Jury?
A Yes, he did
Q Let me show you what's been first marked for identification as Government Exhibit 130 and Government Exhibit 131, showing first to defense counsel.

* * * * *

(EXCERPTS APPEARING AT R85-36-38)

Q Now, Mr. Martin, the subpoena asked for all appointment books and calenders from 1984 through 1991, inclusive, did it not?
A Yes, it did
Q And what year did Mr. Corces produce?
A The phone messages were for - -

Q Excuse me, the calender?
A Calender is 1991
Q Did he produce 1984 through 1991?
A No, sir.
Q Did he explain to the Grand Jury in response to any questions where those other documents were.

MR. GONZALEZ: Your Honor, to which I would object. May we approach the bench?

THE COURT: Oh, yes, we need the reporter.

(Thereupon, the following is a sidebar conference.)

(11:05 a.m.)

Mr. GONZALEZ: Your Honor, at this time, we would move for a mis-trial in that - -

THE COURT: I was looking for Cindy, it's okey, go ahead.

Mr. Gonzalez: Your Honor, at this time, we would move for a mis-trial in that the Government has now gone well beyond what they previously stated they intended on getting into with respect to this Grand Jury Foreman. There are comments now and lack of comments that are being used against Mr. Corces in a - - in a situation where he was in fact compelled to produce records. He never waived his Fifth Amendment privilege. Now, they're not - - now the Government through its questions is not only asking what did Mr. Corces say to the Grand Jury about certain things, but what he didn't say, in other words, leaving a negative inference that he had some obligation to say something which he did not. And I again, Judge, think it's a violation of his Fifth Amendment privilege. I think it goes into - - into matters that are so prejudicial and I think fundamental error to allow it and at this time I would ask that the Court grant a mis-trial. And if the Court does not, you instruct the Jury to disregard that last statement by counsel or that last question by counsel.

THE COURT: Response.

MR. KEHOE: The questions I'm asking, Judge, are the questions that are coming from the Grand Jury transcript itself. I would gladly have you Honor take a look at it. If counsel wants me to go down the questions and answers that were posed to the Grand Jury with the Foreman of the Grand Jury here, that's fine, that's fine. I don't want to say anything more than or anything less than the questions and answers that were given to the Grand Jury that's all. Now, if your Honor, and counsel, if Your Honor wants

me to give him the Grand Jury transcript and ask him to just read through it, that's fine.

THE COURT: Well, I think that it's allowable that you go forward and do this. This is not the first time nor will it probably be the last time that the Grand Jury Foreperson comes and does this type of presentation. This is not an initial problem, it comes up from time to time. It probably is a good idea if you let the Foreperson see the transcript.

* * * * *

(EXCERPTS APPEARING AT 85-41-43)

BY MR. KEHOE:

Q Now, sir, addressing your attention back to Government Exibit 135, the transcript, now Mr. Jung was the representative of the United States at that time, was he not?

A. Yes, sir, he was.

Q And, sir, the testimony that's before you, if I could read the question, and could you then read the answer for the Jurors, starting on page two?

A. Okay

Q Question by Mr. Jung, okay, would you state your name for the record?

A Charles B. Corces, C-O-R-C-E-S

Q Okay, Mr. Corces, you're here pursuant to two subpoenas that were served upon you?

A. And prusuant to the Court's order.

Q Yes, sir. Okay, let me, I'm going to refer to the subpoena which has the date of June 17th, 1992 on it. And I will ask if you brought billing records including payment ledgers, receipts, deposit slips, statements and evidence of payment for Darrin Collado.

A. Yes.

Q Okay. Are they here?

A Yes.

Q Okay. If you would, I'll tell you what will shorten this a bit, let me run through all the names, okay. And Darius Hernandez?

A. Yes.

Q Okay, Lucio and Gerardo Rodriguez?

A Yes, sir.

Q Robert Locotus?
A No, sir.
Q Jose Rendon
A No, sir.
Q Okay, I'm sorry, it was no on Locotus?
A That's correct, no is the answer.
Q And the answer on Rendon is no?
A And Alexdo Hernandez Silver?
A No.
Q Okay. Now these as I'm saying are in the transcript, are they not?
A Yes, they are.

* * * * *

(EXCERPTS APPEARING AT R85-45-47)

BY MR. KEHOE:
Q To which Mr. Jung says, great, thank you, all right. Now, let me ask you then, moving down if you can, Mr. Corces, the subpoena requests all appointment books and calenders from 1984 to 1989 inclusive.
A Excuse me, I think it's 1991 inclusive.
Q I'm sorry, 1991, excuse me, I'm sorry, '91. yes. Did you bring those?
A. I brought what I have.
Q Okay. And what do you have?
A I have certain photocopies of phone message books and I have my 1991 original calender.
Q What happened to the 1990 orginal calender?
A I don't know.
Q Was it destroyed?
A I don't know. I made a diligent search, I haven't destroyed it nor have I transferred it to third persons.
Q All right, and the same goes for the years prior?
A Yes, sir:
Q Okay. And what about telephone and message logs from 1984 to 1991 inclusive?
A I have certain copies here that we were going to provide the State in the State case in reciprocal discovery. I don't know where the originals are.

Q Okay. What happened to - - the subpoena requests all telephone and message logs. What happened to the remainder of your telephone and message logs from 1984 to 1991?

A I don't know.

Q Were they destroyed?

A I didn't destroy them.

Q Did anybody else destroy them?

A Not to my knowledge.

Q Did you make a diligent search for them?

A. Yes, sir.

Q Were you able to find them?

A That's correct.

Q I misspoke there. Were you unable to find them?

A That's correct.

Q Where were they kept?

A They were kept either at my home, one of two storage locations or at 1315 South Howard.

Q Okay when was the last time that you saw your 1990 appointment calender?

A I don't remember.

Q What about your 1990 and 1991 telephone message log book?

A I don't remember that.

Q They're no longer in your control?

A No, sir.

Q You haven't transferred them to anyone?

A That's correct.

* * * * *

(EXCERPTS APPEARING AT R85-48)

Q All right. And you in fact were ordered to produce pursuant to the second subpoena dated September 8th, I'm sorry, dated August 17th, any records in whatever form held, created on or before the 15th of January of 1991 relating to Nelson Gonzalez?

A Correct.

Q All right. Pursuant to the Judge's order to produce those, you have done that?

A Yes, sir.

Q Okay, I think that's you at the bottom there on line twenty-two.

* * * * *

(EXCERPTS APPEARING AT R85-49)

Q All right. What you have in your hands is a manila folder, its your testimony that these are the complete documents in response to this subpoena for any records related to Nelson Gonzalez created on or before the 15th of January?

A That's correct, and I don't believe the original file has anything that's not in here.

* * * * *

(EXCERPTS APPEARING AT R85-54)

MR. GONZALEZ: Your Honor, now that the testimony of Mr. Martin is concluded, I want to renew my motion for mis-trial, and ask to strike his entire testimony in light of the Fifth Amendment objections and the compelling of Judge Nimmons order and the argument that we previously made.

* * * * *

THE COURT: Motion for mis-trial is denied, and your previous motion was also to strike and that's denied and this motion to strike is denied also. That takes care of that.

* * * * *

EXCERPTS - TESTIMONY
OF
CAROL MOSTELLAR
(R90-154 -160)

BY MR. KEHOE:

Q Thank you. Good afternoon, Ms Mostellar.

A Good afternoon

Q Where you live, ma'am?

A I live in St. Petersburg, Florida

Q And I know you have a full time job as a homemaker at this time spending your husband's money you told me.

A Correct.

Q Prior or last year, were you one of the forepersons on Grand Jury 91-2 in this Courthouse?

A I was.

Q And from time to time, Ms Mostellar, did you substitute for Mr. Martin as the foreperson of the Grand Jury?

A Correct.

Q Okay. During one of those occasions when you were the foreperson of the Grand Jury, was a subpoena returnable before that Grand Jury returned by Charles B. Corces?

A It was.

Q And is he in the Courtroom here today; is he in the Courtroom?

A Yes.

Q And could you point him out and describe what he's wearing?

A He's at this table right here.

* * * * *

(EXCERPTS APPEARING AT R90-155-156)

BY MR. KEHOE:

Q Let me show you what's been marked for identification ate (sic) Government Exhibit 137. Does that appear to be a transcript of a Grand Jury hearing on August 13th, 1992, where you were the foreperson?

A It does appear so.

Q And did Mr. Corces appear pursuant to subpoena and produce certain records?

A He did.

Q Let me take you through this and we can skip some of it ma'am. After Mr. Corces appears and he was asked some questions, now we'll go with the procedure that you and I talked about me asking the questions and you answering and if we would move to the bottom of that page. It says on line 24, question, now, all right, you're here as custodian of records for the Law office of Charles B. Corces, correct, and what was his answer on the top of page three?

A Tell you what, why don't you use the Xerox and I'll use that one, page three.

Q Okay. You see that on top of page three?

A I am Charles B. Corces

Q Okay. yes, all right. The subpoena was directed to the custodian of records for the Law Office of Charles B. Corces, correct?

A Mr. Jung, I am the custodian of the records of the Law Office of Charles B. Corces and Charles B. Corces, Professional Association.

Q Question, thank you. All right, Now, the subpoena required that you bring the subpoena, as enforced by the Judge, required that you bring all records and files of any sort in whatever form held for Gregorio Ruiz, David R. Murphey and Frances Conerly; is that correct?

* * * * *

RECORD EXCERPTS RE
JUDGE ROBERT BONNANO GOOD FAITH ISSUE
(R124- 196-199)

BY MR. KEHOE:

Q Thank you, Your Honor. Judge Bonanno, my name is Greg Kehoe, I'm an Assistant United States Attorney. We have never met, is that right:

A That's right.

Q And I have never practiced in front of you?

A Not that I can remember.

Q And you understand, sir, that as a witness in this proceeding, your credibility is in issue?

A Yes

Q Mr. - - Judge Bonanno, tell me, sir - - tell me, sir, have you ever frequented - - better still, do you know what an escort service is?

A Escort service?

Q Yes, sir.

A Yeah.

Q What is an escort service?

A I guess it's a - - where - - I guess it's a sort of like a prostitute - - some king of a prostitution thing.

Q You have no knowledge about that, sir?

A We had - - when I was in County Court we had cases of people who would be charged with prostitution and then what they were talking about, they were involved in escort services. They were like - - they were like fronts for prostitution.

Q Any other knowledge about escort services, sir, other than what you learned in County Court?

A No.

Q Judge Bonanno, tell me about you yourself frequenting escort services, sir?

A I never have.

MR. GONZALEZ: To which I object to that as irrelevant. He said - -

THE COURT: You mean the form of the question?

MR. GONZALEZ: There has to be a good-faith basis for that,

I object to that.

THE COURT: All right. Now, form of the question, is that what you're objecting to?

MR. GONZALEZ: Yes, Your Honor.

THE COURT: Well, perhaps it could be restated. Sustained. Restate it.

MR. GONZALEZ: Your Honor - -

THE COURT: Yes, we've already dealt with some matters.

MR. GONZALEZ: Do we have a proffer of that by the Government? I mean that's - - Your Honor, this - -

THE COURT: Whoa, whoa, whoa, whoa. We have dealt with this gentlemen, let's hear the question. Question.

BY MR. KEHOE:

Q Judge Bonanno, tell me about your contact and attempt in going to escort services, sir.

A Never have gone to escort services.

Q Tell me about using your escort services, Passport Services, sir.

A Never have.

Q Judge Bonanno, do you recognize as you sit here - -

MR. GONZALEZ: Judge, I object to the repititious and the argumentative badgering of the witness. The man said never have and that's been answerd.

THE COURT: Are you laying a foundation?

MR. KEHOE: I'm laying a foundation your Honor?

THE COURT: All right. He's laying a foundation, overruled.

BY MR. KEHOE:

Q Judge Bonanno, do you understand as you sit here that you are under oath?

A Yes.

Q Judge Bonanno, explain to me, sir, why Hillsborough County Vice Squad found your credit card receipts at an escort service:

A Don't know what you're talking about.

Q Explain to me, sir, why law enforcement is in possession of you using excort services in Pinellas County.

A No, never have.

Q You never have?

A Never have. I don't know what they have because nobody's ever contacted me or spoke to me about anything like this. This is brand new to me.

Q Judge Bonanno, did you ever threaten any person, any woman who was part of those escort services with physical injury if she disclosed information concernng you to law enforcment?

A No

Q Never, sir?

A No

* * * * *

RECORD EXCERPTS R124- 216-217

MR. GONZALEZ: Your Honor, at this time, I would move for a mis-trial based on the examination of Judge Bonanno in that it was improper in so many different respects as to matters that the prosecutor went into into and the form in which he attempted to impeach Judge Bonanno. He misstated the matters that are in the record, he tried to testify from news articles in the newspaper to cross-examine Judge Bonanno. He continued to repeat questions to which answers had already been received from Judge Bonanno in the record. He attempted to impeach Judge Bonanno through matters that are outside of the rules with respect to proper impeachment of a witness standing in Judge Bonanno's position. More particularly, I think 608(b) and those - - and those rules pertaining to impeachment were all violated by this latest barrage of cross-examination by the prosecutor. It was to a certain extent nothing more than argumentative, loud, baggering-type statements which were improper in form. I believe that the Government should be placed in a position now to back up with good faith memorandums, 302's, any matters pertaining to where the prosecutor was getting this information from which he attempted to impeach Judge Bonanno.

* * * * *

RECORD EXCERPTS R124- 218

MR. GONZALEZ: I was also suprised that he went to talk about escort services and matters pertaining to some escort service which the Judge denied, but didn't even ask him one question about Ann Aknom and all of this - - all of this evidence that they have had a theory on since the beginning, that Judge Bonanno was doing favors for Mr. Corces because of sexual relationshps he had with Ann Aknom. Apparently, Your Honor, they have absolutely no good faith basis to have that as proof because they don't even ask - - they didn't ask Ann Akonom any questions about her relationship with Judge Bonanno on cross and now Judge Bonanno, the other side of the alleged sexual favors scheme, didn't ask him any questions about her either. So, that leads me to believe, Your Honor, that the Government has proposed to the Court certain relevant conduct in this trial that was brought in through hearsay and in the form of a theory for which they have absolutely no good faith support for.

* * * * *

RECORD EXCERPTS R124-226

THE COURT: All right, Mr. Gonzalez, you can come up here and I can take care of giving that ruling on that topic.

Now this concludes the in camera ex parte presentation by the government. And now, Mr. Gonzalez, I have listened to what the Government has provided me with regard to the Bonanno issue. What if anything further did you want to add before I rule with regard to the motion for mis-trial and the motion to strike with regard to Bonanno?

MR. GONZALEZ: I have nothing further, Judge.

THE COURT: All right. Based on what I have heard, what has now been document, your motion to strike is denied, your motion for mis-trial is denied. The Court will stand on the presentation the government has made. The Government was required to make a good faith presentation with regard to the examination they conducted of Circuit Judge Bonanno. The Court believes, this Court believes that a good faith presentation has been made, and it's there for such appellate review as may be appropriate with regard to the issues, so that is protected.

RECORD EXCEPTS R130-173-175

THE COURT: All right. We'll deal with this issue on this motion regarding the Bonanno matter at the end of the day.

MR. KEHOE: Your Honor, I can tell you what the government's response to that is right now.

THE COURT: All right. Mr. Corces, you can sit down if you like. Go ahead.

MR. KEHOE: The government will stand on the good-faith basis proffer that we provided to your Honor at sidebar.

THE COURT: The in camera ex parte government proffer prior to the time that the government commenced its examination of the witness Bonanno, correct?

MR. KEHOE: And only be supplemented with additional details about other matters after that. If you recall, we had some additional matters, went back to - - there was additional matters to support the good-faith basis of the questions of Judge Bonanno, and we provided you that information.

THE COURT: Yes. There were two ex parte in camera sidebars, noted for the record, Mr. Kehoe, yesterday. And that is your basis. On that basis - -

MR. GONZALEZ: Judge.

THE COURT: Yes.

MR. GONZALEZ: As to that - - as to that, your Honor, we'd ask that the in camera ex parte proceedings be made available to us and to the public so that we may ascertain the good-faith basis of the government. And also, I was in the courtroom, and although I could not hear what the government was telling the court, I never observed at any time the government hand the court as an exhibit anything that should be included in that ex parte in camera proffer.

THE COURT: Okay, The Court reiterates its ruling from yesterday and further emellishes that to indicate that you're not entitled Mr. Gonzalez, to what the Court received and the public is not entitled to that. And the Eleventh Circuit has enough in the record to substantiate that, and the Eleventh Circuit has enough to review. Now, is there anything else, Mr. Kehoe, Mr. Gonzalez?

Supreme Court, U.S.
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No. 95-1206

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES B. CORCES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals improperly affirmed petitioner's conviction and sentence in an unpublished judgment order that did not specifically address each of his claims of error.

2. Whether the district court violated petitioner's Fifth Amendment rights by admitting evidence that he produced documents in response to a subpoena duces tecum directed to the custodian of records of his corporate law office.

3. Whether the district court erred in departing upward from petitioner's Guidelines sentencing range because of petitioner's "gross abuse" of the judicial system.

4. Whether the court of appeals erred in denying petitioner's motion to unseal transcripts of ex parte district court hearings.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Braswell v. *United States*, 487 U.S. 99 (1988)	7, 8, 9
Fisher v. *United States*, 425 U.S. 391 (1976)	9
Furman v. *United States*, 720 F.2d 263 (2d Cir. 1983)	6
Grand Jury Subpoena, In re, 72 F.3d 271 (2d Cir. 1995)	11
Griffin v. *Illinois*, 351 U.S. 12 (1956)	11
Paradyne Corp., In re, 803 F.2d 604 (11th Cir. 1986)	11
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	6
United States v. *Jean*, 25 F.3d 588 (7th Cir. 1994)	11
United States v. *Rivera*, 994 F.2d 942 (1st Cir. 1993)	6, 7

Constitution, statutes and rules:

U.S. Const. Amend. V	3, 4, 7, 8
Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*:	
18 U.S.C. 3742(f)(2)	6, 7
18 U.S.C. 3742(f)(3)	7
18 U.S.C. 2	2
18 U.S.C. 1951 (1988)	2
18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2
28 U.S.C. 1291	6
Sentencing Guidelines:	
§ 2C1.1, Application Note 5	10
§ 5K2.0	4

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1995. A petition for rehearing was denied on November 17, 1995. Pet. App. A27. The petition for a writ of certiorari was filed on January 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to commit extortion, in violation of 18 U.S.C. 1951 (1988). The jury failed to reach a verdict on three other counts, in which petitioner was charged with conspiring to commit racketeering in violation of 18 U.S.C. 1962(d), racketeering in violation of 18 U.S.C. 1962(c), and attempting to commit extortion in violation of 18 U.S.C. 1951 and 2. Petitioner was sentenced to 121 months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. a. Petitioner, an attorney practicing in Tampa, Florida, brokered a bribe between a criminal defendant, Nelson Gonzalez, and a corrupt state prosecutor, John Valenti. Petitioner was Valenti's close friend and had paid him in the past to obtain favorable results in prosecutions. In January 1991, Valenti was prosecuting Gonzalez for murder. Valenti asked petitioner to contact Gonzalez's attorney, Manuel Machin, to suggest the possibility of a bribe in exchange for a favorable plea agreement. Petitioner contacted Machin and told him that Valenti would not agree to a second-degree murder charge "unless you * * * put [$20,000] cash in my hand." Gov't C.A. Br. 5-8.

Machin informed the authorities of petitioner's solicitation and agreed to wear recording equipment during future transactions with petitioner. Recorded conversations between petitioner and Machin, as well as court-authorized electronic wiretaps on petitioner's and Valenti's telephones, revealed numerous

discussions about the bribe request. Petitioner was arrested carrying the bribe money from Machin into his law office. Gov't C.A. Br. 9-15.[1]

b. Before trial, the grand jury investigating the case subpoenaed the records and the custodian of records of petitioner's law office, an entity incorporated under Florida law. See 8/11/92 Tr. 3, 15-17. Petitioner moved to quash the subpoenas or to obtain immunity before complying with them, arguing that enforcement of the subpoenas would violate his Fifth Amendment right against compelled self-incrimination. After a hearing, the district court rejected petitioner's Fifth Amendment claim, explaining that the subpoenas sought corporate, not personal, records. See *id.* at 17. The court also remarked that it had operated on the assumption that the records would be produced by petitioner, and that no one had suggested that any alternate custodian produce the records. *Ibid.* Petitioner subsequently appeared before the grand jury and produced the corporate records. See Gov't C.A. Br. 35-36.

At trial, two grand jurors testified that petitioner had appeared before the grand jury and, as records custodian, had produced and identified the law office's records. Petitioner objected to that testimony on Fifth Amendment grounds. The district court overruled his objection and stated that "[a] substitute custodian could have come in and could have responded to what it was that was made available as the custodian

---

[1] Both Valenti (who cooperated with the prosecution) and Machin testified for the government at trial. There was evidence at trial that petitioner had paid Valenti on several other occasions for favorable dispositions in criminal prosecutions. Gov't C.A. Br. 15-17.

in [a] custodial capacity. The Supreme Court cases are clear that that does not constitute self incrimination. * * * [E]xplanation with regard to what has happened to those documents is not a problem." 11/2/93 Tr. 21.

c. During the course of the trial, the court conducted several ex parte conferences with the prosecution, the defense, and witnesses represented by counsel. Those conferences were conducted to resolve issues concerning attorney-client privileges, Fifth Amendment rights, and ongoing investigations into other crimes. The district court maintained transcripts of the ex parte hearings under seal, and did not disclose them to any party that was excluded from the hearing. Thus, the government did not have access to the transcripts of hearings between the court and petitioner, and petitioner did not have access to the transcripts of hearings between the court and the government. See Gov't C.A. Br. 58-59.

d. Petitioner's offense level under the Sentencing Guidelines was 24. See 3/11/94 Tr. 128. The district court departed upward, under Guidelines § 5K2.0, by six levels to a final offense level of 30. The court remarked that "I don't think the guidelines commission has envisioned what I have heard in this case." 3/11/94 Tr. 125. The court explained further (*id.* at 125-126, 128):

> No, I don't think that the guidelines sentencing commission thinks that this is happening every day in every community in this country, because if it is, law and order is on its way out. To even think that there is a perception that prosecutors or Judges, whether it's State or Federal, can be

> bought and paid for in their determinations, does destroy the system.
>
> * * * * *
>
> An upward departure is absolutely demanded in this case. How much? It should be much more than this probably, but I think this is fair. It is fair because it sets what I believe is consistent with the guidelines. If the Judge—if the Federal Judge who accepted the bribe got six years, then I think for what you've done to this system this is fair.

The court reiterated that it found reason to depart from the Guidelines sentencing range because "the facts as found are of the kind not contemplated by the sentencing commission," and it stated that the departure motion was "granted finding gross abuse of the legal and judicial system of the Thirteenth Judicial Circuit, State of Florida." 3/11/94 Tr. 129; see also Pet. App. A14-A15. Petitioner was sentenced to 121 months' imprisonment. Without the departure, his sentencing range would have been 51 to 63 months' imprisonment. *Id.* at A10-A15.

2. On appeal, petitioner contended (among other things) that the district court had erred in allowing the grand jurors to testify about his appearance and production of records before the grand jury, that the court had improperly departed upward from the Guidelines sentencing range, and that the court had erred in refusing to provide him with transcripts of the ex parte hearings held with the government. He also filed a motion in the court of appeals for access to the sealed transcripts. On July 18, 1994, the court of appeals ordered the government to submit the

transcripts of the ex parte hearings conferences between the government and the district court. See Pet. App. A3. On September 12, 1995, the court of appeals affirmed petitioner's conviction and sentence in a judgment order, *id.* at A1-A2, and also denied his motion for access to the seaied transcripts, *id.* at A4.

ARGUMENT

1. Petitioner's central contention (Pet. 22-25) is that the court of appeals erred in affirming his conviction and sentence in a judgment order rather than a written opinion. That contention is without merit. The right to appeal provided a defendant under 28 U.S.C. 1291 entitles him to review of the district court's judgment by the court of appeals. Petitioner received that review. The right to an appeal does not also encompass the right to a written opinion discussing each of the defendant's claims. "There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion," and the "fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 264, 265 (2d Cir. 1983) (per curiam); see also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals should "have wide latitude in their decisions of whether or how to write opinions").

United States v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), relied on by petitioner (Pet. 14), is not to the contrary. In that case, the First Circuit, per then-Chief Judge Breyer, observed that, under 18 U.S.C. 3742(f)(2), a court of appeals must state "specific reasons" for its conclusion that a sentence imposed

by the district court is outside the applicable Guidelines range and is unreasonable. See 994 F.2d at 950.[2] The Sentencing Reform Act does not, however, require a court of appeals to give specific reasons for affirming a district court's decision to sentence outside the applicable Guidelines range. See 18 U.S.C. 3742(f)(3) ("If the court of appeals determines that the sentence * * * is not described in paragraph (1) or (2), it shall affirm the sentence.").[3]

2. Petitioner renews (Pet. 17-20) his contention that the district court violated his Fifth Amendment rights when it permitted two grand jurors to testify that he produced the records subpoenaed from his office. That contention is incorrect. The subpoena was directed to petitioner's law office, not petitioner. That office had no Fifth Amendment privilege. Petitioner waived his personal Fifth Amendment act-of-production privilege when he voluntarily produced the documents himself, instead of designating an alternate custodian.

In *Braswell* v. *United States*, 487 U.S. 99, 102 (1988), the Court reaffirmed that corporations and other artificial business entities, no matter how small, "are not protected by the Fifth Amendment."

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[2] Section 3742(f)(2) provides, in pertinent part: "If the court of appeals determines that the sentence * * * is outside the applicable guideline range and is unreasonable[,] * * * it shall state specific reasons for its conclusions[.]"

[3] The petition does not raise the issue presented in *Koon* v. *United States*, No. 94-1664, and *Powell* v. *United States*, No. 94-8842 (both argued Feb. 20, 1996), namely, the standard of review to be applied by a court of appeals in reviewing a district court's decision to depart from the applicable Guidelines range. Accordingly, this case need not be held for *Koon* and *Powell*.

The Court therefore held that "a corporate custodian * * * may not resist a subpoena for corporate records" by invoking his personal privilege against self-incrimination, because such an officer "holds th[e] documents in a representative rather than a personal capacity." *Id.* at 109, 110.

The Court also stated in *Braswell* that, where a custodian of records acts in a representative capacity, the government "may make no evidentiary use of the 'individual act' [of production] against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian." 487 U.S. at 118. At the same time, the Court observed that, in most situations, the production of a corporation's documents by a custodian presents no Fifth Amendment difficulty because, even if the regular custodian might be incriminated by his act of producing the documents, an alternate custodian can be appointed to produce the subpoenaed materials. *Id.* at 116.

In this case, the grand jurors testified that petitioner personally produced the documents called for by the subpoena. 11/2/93 Tr. 33; 11/3/93 Tr. 154. Petitioner was not, however, compelled to produce the corporate documents personally. The subpoenas were directed to the custodian of records of petitioner's law office, not to petitioner as an individual, nor to petitioner (or any other specific person) as custodian. Thus, as the district court explained at trial, "[a] substitute custodian could have come in and could have responded to" the subpoenas. 11/2/93 Tr. 21.

At the hearing on his motion to quash the subpoena, petitioner did not argue that the appointment of a surrogate custodian was infeasible. See 8/11/92 Tr. 17; cf. *Braswell*, 487 U.S. at 116-117. Instead of appointing an alternate custodian, or requesting the court to make such an appointment, petitioner chose to appear before the grand jury himself. His appearance in person was voluntary, and that appearance, accordingly, is fatal to his claim of compelled self-incrimination.

Even if the district court erred in permitting the grand jurors to refer to petitioner personally as the custodian who produced the records, that error was harmless. The only testimonial content of petitioner's production of the documents was his tacit acknowledgment that the documents existed, were within his control, and were those described in the subpoena. See *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). Most of the documents authenticated through evidence of petitioner's production of them concerned petitioner's transactions with Valenti on behalf of other beneficiaries. Those transactions, along with the Gonzalez matter, formed the basis of the racketeering counts. Petitioner was not convicted on those racketeering charges. See Gov't C.A. Br. 2, 5. The jury also heard reference to petitioner's grand jury testimony concerning the Gonzalez file, but that testimony was trivial and ministerial, and neither the file nor petitioner's grand jury testimony about it was discussed in closing arguments. See *id.* at 37.

3. Petitioner argues (Pet. 11-16) that the district court erred in departing upward from his Guidelines sentencing range, and that the court of appeals erred in affirming that departure without "explaining, in

any way, why the factor considered as justifying departure was valid or why the extent of the departure was reasonable." Pet. 11. As we explain above (pp. 6-7, *supra*), the court of appeals was not required to state reasons for its affirmance of the sentence.

The district court explained on the record that the perception that prosecutors can be "bought and paid for in their determinations[] does destroy the system." 3/11/94 Tr. 125-126. It also found an aggravating circumstance—"gross abuse of the legal and judicial system of the Thirteenth Judicial Circuit, State of Florida" (*id.* at 129)—that the Sentencing Commission has expressly stated may justify a departure in an extortion case. See Guidelines § 2C1.1, Application Note 5 (when "the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted"). The district court explained the extent of the six-level departure by stating that "[i]t should be much more than this probably, but I think this is fair" because it "sets what I believe is consistent with the guidelines." 3/11/94 Tr. 127.

4. Finally, petitioner renews his argument (Pet. 20-22) that he should have been given access to transcripts of the ex parte hearings between the court and the prosecutor. Petitioner does not contend that the district court erred in conducting the ex parte conferences. He argues only that the court erred in refusing to provide him with transcripts of the conferences after the fact. Petitioner contends that the transcripts might support a claim that he was prejudiced by some government conduct at the

hearings, and that without the transcripts he was "unable to intelligently evaluate which issues to raise or not to raise on appeal." Pet. 22. That claim does not merit further review by this Court.

Petitioner relies on decisions holding that trial transcripts must be available to a criminal defendant in pursuing an appeal. See Pet. 21 (citing, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956)). Those decisions, however, do not stand for the proposition that a defendant is entitled to transcripts of ex parte hearings from which he was properly excluded in the first place. Although transcripts of ex parte hearings are "usually" provided, see *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986) (per curiam), there is no absolute right to such transcripts, given the sensitive nature of the information that may be disclosed at ex parte hearings. See, *e.g.*, *In re Grand Jury Subpoena*, 72 F.3d 271, 276-277 (2d Cir. 1995); *United States* v. *Jean*, 25 F.3d 588, 594 & n.2 (7th Cir. 1994). Moreover, in this case, after petitioner moved to unseal the ex parte transcripts, the court of appeals ordered the government to submit the transcripts for its review; the government and the district court both submitted hearing transcripts. In its appellate brief (at 59), the government also invited the court of appeals to review the transcripts. Ultimately, the court denied petitioner's motion to unseal on the day that it affirmed his conviction and sentence. Thus, it appears that the court of appeals reviewed the transcripts, concluded that the reason for keeping them under seal still existed, and further concluded that nothing prejudicial to petitioner occurred during the hearings. Those factbound determinations do not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996